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EDITOR'S NOTE

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. 85-437-CSX
atus: GRANTED

Title: Richard Arcara, District Attorney of Erie County, Petitioner
v.
Cloud Books, Inc., etc., et al.

cketed:
ptember 11, 1985

Court: Court of Appeals of New York

Counsel for petitioner: Arcara,Richard J., DeFranks,John J.

Counsel for respondent: Cambria Jr.,Paul John

try	Date	Note	Proceedings and Orders
1	Sep 11 1985	G	Petition for writ of certiorari filed.
2	Oct 15 1985		Brief of respondents Cloud Books, et al. in opposition filed.
3	Oct 16 1985		DISTRIBUTED. November 1, 1985
5	Nov 4 1985		REDISTRIBUTED. November 8, 1985
6	Nov 12 1985		Petition GRANTED.
			**********
8	Dec 16 1985		Order extending time to file brief of petitioner on the merits until January 6, 1986.
9	Dec 30 1985		Brief amicus curiae of Santa Ana, CA filed.
0	Dec 30 1985		Record filed.
1	Jan 6 1986		Brief amicus curiae of City of New York filed.
2	Jan 6 1986		Joint appendix filed.
3	Jan 6 1986		Brief of petitioner Arcara, DA of Erie County filed.
4	Feb 5 1986		Brief of respondents Cloud Books, Inc., et al. filed.
6	Feb 5 1986	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
7	Feb 24 1986		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
8	Feb 7 1986		Lodging from respondent recived. 40 copies.
9	Mar 14 1986		SET FOR ARGUMENT, Tuesday, April 29, 1986. (2nd case)
0	Mar 14 1986		CIRCULATED.
1	Mar 31 1986	D	Motion of City of Santa Ana for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
2	Apr 7 1986		Motion of City of Santa Ana for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
3	Apr 21 1986	X	Reply brief of petitioner Arcara, DA of Erie County filed.
4	Apr 29 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-437 No.

In The

Supreme Court of the United States

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,

Petitioner,

vs.

CLOUD BOOKS, INC. d/b/a,
VILLAGE BOOK AND NEWS STORE,
CHARLES A. OTTAVIANO,
BLANCHE DUDLEY and
all other persons unknown claiming
any ownership, right, title or
interest in the property affected
by this action,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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(11885)

QUESTION PRESENTED

Where it is alleged that acts of masturbation, fellatio and prostitution are occurring on a premises denominated as a bookstore, does the First Amendment operate to immunize such premises from closure as a nuisance under New York State's Public Health Law?

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In The

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THE PEOPLE OF THE STATE OF NEW YORK
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all other persons unknown claiming
any ownership, right, title or
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by this action,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

OPINION BELOW

On October 1, 1982, Erie County District Attorney Richard J. Arcara, on behalf of the People of the State of New York, commenced an action to enjoin illicit conduct occurring at the Village Book and News Store located at 3102 Delaware Avenue, Kenmore, New York and to close said premises for a period of one

year. The District Attorney's Verified Complaint set forth two causes of action. The first, sounding in common law nuisance, was dismissed by Special Term and is not at issue on this petition. The second was based upon Article 23, Title II of the New York Public Health Law.

On November 1, 1982 the defendant moved for partial summary judgment on the statutory cause of action, arguing that Title II was intended to cover only houses of prostitution and thus was inapplicable to a store selling books and magazines. He further alleged that the relief requested, in particular the order of abatement, would constitute a prior restraint prohibited by the First Amendment to the United States Constitution. For purposes of the motion for partial summary judgment, the defendant admitted the truth of the allegations of sexual activity contained in the District Attorney's Complaint (A53 *et seq.*).*

In a memorandum decision dated May 31, 1983, New York Supreme Court Justice Thomas P. Flaherty denied defendant's motion for partial summary judgment in all respects. An order of the court was entered in the Erie County Clerk's Office on June 14, 1983.

The order was appealed to the New York Appellate Division, Fourth Judicial Department which, on April 12, 1984 issued an opinion and order unanimously affirming the determination of the lower court (101 A.D.2d 163).

Appellant moved on May 15, 1984 for permission to appeal to the Court of Appeals. On July 13, 1984 an order was entered pursuant to Article 6, Section 3(b)(4) of the New York State Constitution and CPLR 5602 and 5713 certifying the following two questions:

* Numbers in parentheses preceded by the letter A refer to pages in the petitioner's Appendix.

(1) Whether Title II, Article 23 of the Public Health Law is applicable to enjoin a nuisance occurring on premises other than a house of prostitution?

(2) Do the statute's mandatory closure provisions constitute an impermissible prior restraint?

On June 13, 1985 the Court of Appeals, with one justice dissenting in part, answered both questions affirmatively.

JURISDICTION OF THIS COURT

The New York State Court of Appeals determined on June 13, 1985 that the mandatory closure provisions of Article 23, Title II of the New York Public Health Law constitute an impermissible prior restraint in violation of the First Amendment to the United States Constitution when applied to a premises housing a bookstore. Because the validity of a state statute was drawn into question on the ground of its being repugnant to the Constitution of the United States, jurisdiction is invoked under 28 U.S.C. § 1257(3).

28 U.S.C. § 2403(b) may be applicable inasmuch as this petition concerns the constitutionality of a statute of the State of New York.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE PUBLIC HEALTH LAW
ARTICLE 23, TITLE II

§ 2320. Houses of prostitution; equipment; nuisance

1. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.

2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided.

§ 2321. Houses of prostitution; injunction; jurisdiction, complaint and parties to the action

1. When a nuisance is kept, maintained, or exists, as defined in this article, the district attorney, or any citizen of the county, or any society, association, or body incorporated under the laws of this state, may maintain an action in equity in the name of the people of the state of New York, upon the relation of such district

attorney, citizen, or corporation to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same from further conducting or maintaining the same, and the owner, or agent of the building or ground upon which said nuisance exists, from further permitting such building or ground or both to be so used.

§ 2329. Houses of prostitution; injunction; order of abatement; sale and removal of property; fees

1. If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in any court, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance and shall direct the sale of such in the manner provided for the sale of chattels under execution, and shall direct the effectual closing of the building, erection or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released as hereinafter provided.

§ 2332. Houses of prostitution; abatement; release of property on filing bond

1. If the owner of the premises in which a nuisance, as defined in this article, has been maintained appears and pays all costs of the proceeding and files a bond with sureties to be approved by the court in the full value of the property, to be ascertained by the court, or in vacation by the judge thereof, conditioned that he will immediately abate said nuisance and prevent the same from being established, or kept therein within a period of one year thereafter, the court, or in vacation the judge, if satisfied of his good faith, may order the premises, closed or sought to be closed

under the order of abatement, delivered to said owner, and said order of abatement cancelled so far as the same may relate to said real property.

2 .The release of the property under the provisions of this section shall not release it from the injunction herein provided against the property nor any of the defendants nor from any judgment, lien, or liability to which it may be subject by law.

STATEMENT OF THE CASE

The present petition derives from an action for an injunction to abate a nuisance located at 3102 Delaware Avenue, Kenmore, New York. Occupying the premises is Village Book and News, a store which sells what respondent readily characterizes as materials of a "sexually frank nature." In addition to sexually explicit books and magazines, the premises house a number of coin-operated movie booths which show explicit sexual material.

As a result of an undercover investigation conducted by the Erie County Sheriff's Department during the latter half of September 1982, a continuing series of illegal activities, unrelated to the sale of books or movies, were discovered at the premises. As attested to in Petitioner's verified complaint (A53) these activities, observed by an undercover police officer, included masturbation, fellatio, prostitution and the sale of drugs. Defendant's knowledge of the acts was demonstrated by the statements of store managers who indicated that such acts were commonplace and that their primary concern was that store patrons continue to "put quarters in the machines" (A56-57).

Because of the ongoing nature of the acts complained of and due to the knowledge and acquiescence of defendant Cloud Books in allowing these acts to continue, petitioner commenced the instant equitable action to abate the nuisance on the premises.

REASON FOR GRANTING CERTIORARI

The New York State Court of Appeals erred in holding that Article 23 Title II of the New York Public Health Law violates the First Amendment to the United States Constitution.

In the instant case plaintiff, District Attorney of Erie County, State of New York, brought an action under Article 23, Title II, of the New York Public Health Law to enjoin sexual activity occurring at a bookstore operated by defendant, Cloud Books, Inc. The District Attorney also sought, pursuant to the statute, an order of abatement closing the premises for one year.

The New York Court of Appeals ruled that while sexual activity could properly be enjoined as a public nuisance, the closure provision of Article 23, Title II constituted an impermissible prior restraint upon First Amendment freedoms in that the premises contemplated for closure housed an adult bookstore.

In reaching its decision the Court of Appeals acknowledged that the Public Health Law nuisance abatement action brought by the District Attorney was not based in any part on the content or character of the publications sold by the bookstore, but rather upon allegations that acts of fellatio, masturbation and prostitution had occurred on the premises. Nevertheless the court concluded that a bookstore permitting, acquiescing in, or profitting by such open sexual conduct must be treated differently under the First Amendment to the United States Constitution from other commercial establishments not in the business of disseminating printed materials.

Petitioner urges that a writ of certiorari to the New York State Court of Appeals be g. nted so as to allow this Court to consider whether an action seek. g closure of a bookstore as a public nuisance constitutes an impermissible prior restraint; whether the

First Amendment immunizes bookstores in state public nuisance actions founded upon the occurrence of sexual activity on the premises; and whether this Court's decision in *United States v. O'Brien*, 391 U.S. 367, has been misinterpreted and misapplied by the Court of Appeals. Further, certiorari is sought to resolve the conflict existing in the state courts as to the constitutional viability of nuisance actions involving premises purported to exist as legitimate bookstores.

First it must be noted that the reasoning presented by the court does not support its holding, namely that the closure mandated by the statute constitutes an impermissible prior restraint on the dissemination of First Amendment materials. The court failed even to address the issue of prior restraint but instead based its determination upon its finding that closure would have an "incidental" effect on the sale of printed matter. It is asserted by the petitioner that not only would closure under the statute *not* constitute a prior restraint, but also that the court, without any basis, magnified the significance accorded any resultant "incidental" effect.

While closure would have an effect on the operation of the bookstore in that the managers would be forced to relocate their business, it would not require termination of said business nor would it impose any restriction upon the type or content of material offered for sale. Because the essence of prior restraint is government control over the message, ideas, subject matter or content of First Amendment materials (see *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96; *New York Times v. Sullivan*, 376 U.S. 254, 269-270), the absence of content censorship in the present case makes clear the absence of prior restraint. Rather, the situation at bar is analogous to that of the bookstore owner whose property is subjected to a tax foreclosure sale or one whose establishment is closed as a result of fire code violations. While the First Amendment may be peripherally involved, as

noted by this Court, "to say the ordinance presents a First Amendment *issue* is not necessarily to say it constitutes a First Amendment *violation*" (*Members of City Council v. Taxpayers for Vincent*,____U.S.____, 104 S.Ct. 2118, 2128, citing *Metromedia, Inc. v. San Diego*, 453 U.S. 490,561). Under the facts of this case, closure, which would not prevent alternative and unimpeded distribution of bookstore materials, would not abrogate the defendant's constitutionally protected rights.

Having given short shrift to the question of whether the law under consideration constitutes a prior restraint, the Court of Appeals relied upon this Court's decision in *United States v. O'Brien*, *supra*, as the linchpin in its invalidation of the closure provisions of the Public Health Law. The New York Court, with specific reference to the language of *O'Brien*, observed that under circumstances where speech and nonspeech elements are combined in the same course of conduct, a law aimed at the restriction of the nonspeech element, but having an incidental effect on protected expression, is justified

> "if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest". (391 U.S. at 367).

The Court of Appeals determined that the abatement of a public nuisance was within the power of the state, that Article 23, Title II, of the Public Health Law furthered an important governmental interest, and that the interest in restricting prostitution and sexual activity in a bookstore is clearly unrelated to the suppression of free expression. The court held, however, that the District Attorney had not demonstrated that a means less restrictive than closure, i.e. injunction, would be insufficient to abate the nuisance occurring at the bookstore. Thus, the court con-

cluded, the closure provision of the Public Health Law constituted an unconstitutional limitation on defendant's First Amendment rights.

It appears that the Court of Appeals' focus in applying *O'Brien* resulted from its conclusion that closure of the bookstore would have an "incidental" effect upon the sale of printed material. The existence of an incidental effect, however, can not be equated with the potential constitutional deprivation resulting from imposition of a prior restraint. While closure could conceivably influence the operation of the bookstore, if only to cause it to relocate to continue its commercial efforts, this Court has not held that such incidental effect is sufficient to justify statutory invalidation.

Significantly, attention to "incidental effect" *alone* does disservice to the *O'Brien* holding. It cannot be disputed that countless existing laws have some incidental effect upon protected expression, yet such effect does not automatically render those statutes constitutionally infirm.

Surely, no one would deny that the incarceration of the owner of a news publication for theft would have some incidental effect upon speech. Nor could it be refuted that the jailing of a political party leader for assault would curtail that person's right to proffer political ideas.[1] On the other hand, it could not be seriously contended that the legitimate exercise of First Amendment rights endows one with a simultaneous immunity from penal sanctions

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[1] Cf. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, ___U.S.___, 104 S.Ct. 2839 wherein the dissent, addressing the incidental impact on protected expression which would result from imposition of a ceiling on the fees charged by fundaisers, commented: "But such an indirect and incidental impact on expression is not sufficient to subject such regulation to strict First Amendment scrutiny. Otherwise, national forest legislation would be equally suspect as tending to raise the price and limit the quantity of paper" (*Munson*, *supra* at 2857).

aimed at the prohibition of conduct unrelated to the freedom of expression. Indeed the disunion of the sexual conduct and the sale of printed materials in the present case is precisely the circumstance ignored by the Court of Appeals.

In a gloss over the threshhold consideration pertinent to the applicability of the four-pronged *O'Brien* test, the Court of Appeals paid no heed to the necessary pre-condition that the so-called test be employed only in situations where the government seeks to regulate the nonspeech aspect of conduct comprised of both speech and nonspeech elements. The conduct sought to be controlled herein consisted of documented acts of prostitution, lewdness and masturbation occurring on premises open to the general public. While such acts clearly can be characterized as unprotected nonspeech, it cannot be asserted, nor has it ever been alleged, that these particular acts include an element of protected speech. And although the sale of books and magazines clearly includes a speech element, under no analysis could it be concluded that the countenancing of sexual activity on the premises is part of, necessary to, or entwined with the legitimate dissemination of printed materials. In truth, the independent character of each activity is conceded by the defendant Cloud Books, Inc. in its verified answer to the district attorney's complaint where it was indicated that the sexual activity on the premises, if existing, was of no necessity to the lawful operation of the bookstore (A64 *et seq.*).

Review of *O'Brien* further emphasizes the inapplicability of that decision to the circumstances of the present case. In *O'Brien*, this Court considered whether a federal statute prohibiting the knowing destruction of a draft registration certificate was violative of the First Amendment. O'Brien argued that the conduct of burning his certificate was "symbolic speech," a "communication of ideas by conduct," and a "demonstration against the war and against the draft." This Court, assuming but

not deciding that O'Brien's conduct brought into play the speech protections of the First Amendment, upheld the statute and reinstated the defendant's conviction.

Cloud Books, Inc. makes no claim that the chronicle of sexual acts conducted on its premises constituted symbolic speech, a communication of ideas, or a statement regarding any political or social issue. Indeed, under the present circumstances, such a claim would find no basis in fact, law or logic. The Court of Appeals' reliance upon *O'Brien* in its invalidation of the closure provision of the Public Health Law, therefore, demonstrates a patent misapprehension of First Amendment protections to the severe detriment of the public at large.

Even were *O'Brien* to be applicable, the procedure utilized by the court to invalidate the closure statute would constitute error. Notably the case was before the court on appeal from a denial of a motion for summary judgment. As a result of this legal posture, no trial has been held or conviction obtained, nor has any sanction been imposed upon the defendants. Notwithstanding the court's conclusion that, "In the present case, there has been no 'less restrictive' relief imposed, nor has the District Attorney demonstrated that the injunctive relief provided for in Title II would be insufficient to abate the nuisance" (A!9), it is submitted that there has been no opportunity for such proof. Indeed, the evidence which was before the court, i.e. the information contained in the pleadings filed below, provides support for the

contention that a remedy less restrictive than closure would not be effective.[2] As stated on behalf of the defendant Cloud Books:

> "It is submitted . . . that no such activity [of an autoerotic nature] occurred on the premises, or if they occurred, they merely constituted acts of indiscretion by patrons and were done without the knowledge, either explicit or implied, of any employees or agents of the defendant Cloud Books, Inc. It is further stated that it is firm corporate policy, which is made clearly known to all employees, that if such activity occurs on the premises of the Village Book and News Store, that the patrons are immediately asked to leave and are not allowed to frequent the premises. This corporate policy is strictly enforced and the employees are further informed that any deviation from the policy, or their failure to enforce the same strictly, would lead to the immediate termination of employment." (A65-66).
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> " . . . no such activities of solicitation [for purposes of prostitution] are allowed to occur or are otherwise condoned by any employees, agents, etc. of Cloud Books, Inc. Rather, all employees of Cloud Books, Inc. are informed such that if any activity occurs on the premises of the Village Book & News Store, that they are to request the patron involved to immediately leave the premises and further bar them from re-entry. Furthermore, all employees of Cloud Books, Inc. are informed that any deviation from this corporate policy would lead to immediate termination of employment. (A66-67).

The proof by affidavit that acts of masturbation, fellatio and prostitution were commonplace in the booth area of the book-

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[2] See *Commonwealth v. Croatan Books, Inc.*, 232 S.E.2d 86, wherein the court attempted to fashion a less restrictive remedy than closure to abate the nuisance occurring at an adult bookstore. "The trial court ordered, with the agreement of the parties, that Croatan Books rope off two of the four movie booth access ways, repair any openings between the booths, and hire uniformed guards to prevent loitering in the hallways and use of any booth by more than one patron at a time" Despite these measures, the government was able to demonstrate that such failed to abate the nuisance occasioned by the sexual acts.

store in defiance of the "corporate policy" stated above indicates the ineffectiveness of any remedy reliant upon either management or employee monitoring of illicit activity. Undeniably, the Court of Appeals' finding that a remedy less restrictive than closure would suffice to further the valid governmental interest in eliminating the sexual activities on the premises was both rash and unjustifiable.

Under the circumstances of this case the court's action must be interpreted to constitute a facial invalidation of the statute based not upon the facts of this case, since there were no facts present to support the court's decision, but upon the court's finding that the statutory remedy of closure is unconstitutional with respect to all premises housing any activity ostensibly entitled to First Amendment protection. A facial challenge to a statute can be sustained only where the overbreadth of a statute, in relation to its legitimate reach, is substantial (See *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, ____U.S.____, 104 S.Ct. 2839, 2848, *Broadrick v. Oklahoma*, 413 U.S. 601, 616). Inasmuch as the statute at issue cannot be used to regulate the content of the materials disseminated by the bookstore, but rather enjoins only the illegal conduct occurring on the premises, its sweep is limited. The Court of Appeals has thus erred in applying an overbreadth doctrine to effect invalidation since the potential deterrence of constitutionally protected activity is at most minimal.

The confusion represented by the Court of Appeals' decision is not confined to New York State. At least three other states have dealt with similar issues emanating from almost identical nuisance statutes with differing results.

In *Commonwealth v. Croatan Books, Inc.*, 323 S.E.2d 86, the Virginia court of last resort upheld a lower court's order, issued pursuant to the state's nuisance statute, closing an adult bookstore as a result of illicit sexual activity occurring on the premises. The court found the *O'Brien* test to be applicable; however, on

proof that an earlier order enjoining the illegal activity had been ineffective, the court determined that no less restrictive remedy than closure would prevent recurrence or continuation of the nuisance. In declaring the *O'Brien* test to be satisfied, the court stated:

> "Thus, what purported to be less restrictive remedial measures failed to abate what the trial court had unequivocally found by clear and convincing evidence to be a nuisance under the provisions of Code § 48-7. This failure vindicates the legislative determination that closure is necessary to abate the kind of outrageous criminal activity disclosed by the record" (*Croatan Books, supra* at 90).

The California Superior Court, in *People ex rel. Van De Kamp v. American Art Enterprises, Inc.*, , 33 Cal. 3d 328, 656 P.2d 1170, appears likewise to have accepted, by favorable reference to the lower court opinion, reliance upon the *O'Brien* test and, in addition, the lower court's finding that closure would constitute an impermissible prior restraint.[3] In *American Art* the court found the need for closure to be obviated by the owners of the premises who, subsequent to initial proceedings, voluntarily abated the nuisance by leasing their building to an unrelated electronics firm.

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[3] In reference to the first appeal in the case, *People ex rel. Van De Kamp v. American Art Enterprises, Inc.*, 75 Cal.App.3d 523, 529, the court noted:

"Nevertheless, since the People had conceded that the publishing business did not involve obscenity, the Court of Appeals recognized that application of the full sanctions authorized by the act would clash with settled constitutional free speech principles. It explained: 'Because the publishing activity conducted at the Lassen Street building constitutes initially the sole purpose for which the building is used and it is conceded that obscenity is not involved, closure of the building and removal of property from it is an unconstitutional restraint upon protected speech and press itself. [citations.]' (Id., at p. 531, 142 Cal. Rptr. 338)." (*American Art, supra*, 656 P.2d at 1171).

A third state court, the Pennsylvania Superior Court, affirmed the padlocking of two adult bookstores found to constitute public nuisances without reference to the *O'Brien* test but upon its analysis that closure does not constitute a prior restraint. That court in *Commonwealth ex rel. Lewis v. Allouwill*, 478 A.2d 1334, rejected as without merit the defendant's assertions that the statute at issue constituted First and Fourteenth Amendment violations.

> "Contrary to appellant's arguments, whether the materials sold in Maxim's Novelty Shop and Sweden Adult Bookstore were obscene is not at issue in this case as the illicit sexual activities were the basis for the injunctions. We recognize that the injunction may have had an incidental effect on the dissemination of the printed materials sold in these bookstores; however, we also note that because the order allows appellants to remove their merchandise from the stores and does not prohibit their dissemination, it is conceivable that appellants could continue to sell their books and magazines elsewhere." (*Allouwill, supra*, at 1339)

The obvious lack of consistency in the holdings of the various state courts which have addressed the issue herein provides a compelling rationale for intervention by this Court. Review would provide clarification of the First Amendment considerations resulting from enforcement of public health and nuisance legislation.

The fact that the premises contemplated for closure was utilized in part for the dissemination of printed materials should not work to immunize such premises from the long recognized right of communities to eradicate existing health nuisances through meaningful and effective sanctions. To be sure, such privilege or exemption would operate as an invitation to those responsible for the creation and maintenance of public nuisances to defy the attempts of legislative bodies to control offensive conditions in the most efficient manner.

Because the court inexplicably equated the concept of prior restraint with that of incidental effect, its ruling herein will assuredly give rise to the assertion of a "prior restraint" defense in closure actions against unscrupulous individuals who will undoubtedly seek to fashion the circumstances and conditions of their operations so as to deftly establish a colorable claim under the First Amendment. One need be no visionary to recognize that the magazine rack in the doorway of a brothel may well be marketed as the insurance policy against court ordered closure. This is certainly not to say that the First Amendment is to be ignored whenever the government has a legitimate interest in regulating particular conditions or conduct but rather that the law's safeguards be employed to protect speech and the exchange of ideas rather than offensive sexual activity having no bearing upon the messages sought to be promulgated.

The *de facto* immunity created and conferred by the New York Court of Appeals in the present case clearly works to eviscerate the community protections provided by public nuisance statutes. It also risks a perversion of the First Amendment whereby the might of the law becomes the shield of the lawless. Neither the Constitution nor the decisions of this Court require that such anomoly be allowed to exist.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the within petition.

Respectfully submitted,

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JO W. FABER
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Of Counsel

September 4th, 1985.

APPENDICES

APPENDIX A — REMITTITUR OF NEW YORK STATE COURT OF APPEALS DATED JUNE 13, 1985.

Remittitur

Court of Appeals
State of New York

The Hon. Sol Wachtler, Chief Judge Presiding

4 No. 127

The People &c. ex rel. Richard J. Arcara, District Attorney of Erie County,

Respondent,

v.

Cloud Books, Inc., d/b/a Village Book and News Store,

Appellant,

et al.,

Defendants.

The appellant in the above entitled appeal appeared by Lipsitz, Green, Fahringer, Roll, Schuller & James, Esqs.; *the respondent appeared by* Hon. Richard J. Arcara, District Attorney, Erie County.

The Court, after due deliberation, orders and adjudges that the order is modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. Questions certified answered in the affirmative. Opinion by Chief Judge Wachtler in which Judges Meyer, Simons, Kaye and Alexander concur. Judge Jasen dissents in part and votes to affirm in an opinion. Judge Titone took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Erie County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

[Signature]
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 13, *1985.*
[1985 JUN 20 PM 3:19/FILED ERIE COUNTY CLERK'S OFFICE]

APPENDIX B — OPINION OF NEW YORK STATE COURT OF APPEALS DATED JUNE 13, 1985

[OPINION — This opinion is uncorrected and subject to revision before publication in the New York Reports.]

State of New York
Court of Appeals

4 No. 127
The People &c. ex rel. Richard J. Arcara, District Attorney of Erie County,

Respondent,

v.

Cloud Books, Inc., d/b/a Village Book and News Store,

Appellant,

et al.,

Defendants.

(127)Paul J. Cambria,Jr.,Buffalo, for appellant.

Richard J. Arcara,Erie County DA(John J. DeFranks,Louis A. Haremski & Jo W. Faber of counsel) for respondent.

WACHTLER, Ch. J.

Plaintiff, the District Attorney of Erie County, has brought this action under Article 23, Title II, of the Public Health Law to permanently enjoin any conduct constituting lewdness, assignation or prostitution at a bookstore operated by defendant, Cloud Books, Inc., and to obtain an order of abatement which would close the premises for one year. The issues on this appeal are whether the statute under which the District Attorney proceeds applies to the type of business run by Cloud Books, and if so, whether the mandatory closure provision of the statute, on these facts, would be an impermissible prior restraint.

I.

Defendant, Cloud Books, Inc., operates a bookstore, The Village Books and News, on premises which it leases in the Village of Kenmore.[1] The store sells books and magazines of a sexually frank nature and contains several coin-operated movie machines showing sexually explicit material. There are no specific allegations in this action that any of these items are obscene.

In September, 1982, as part of an investigation initiated by the Erie County District Attorney, a deputy sheriff, working undercover, made several visits to the bookstore. In an affidavit recounting his visits, the officer specified various lewd and illegal acts he had witnessed. Based on this information, the District Attorney commenced the present action on behalf of the People seeking to enjoin the illicit conduct and to close the premises. The verified complaint alleges that the deputy sheriff observed sexual activity by patrons of the store, including four acts of masturbation and one act of fellatio, and was himself solicited for sexual conduct for a fee by persons on the premises on several occasions. The District Attorney also alleges that defendant was aware of these activities and permitted them to occur as long as the persons involved also spent some money on the books, magazines or movie machines in the store.

The complaint sets forth two causes of action. The first cause of action, sounding in common law nuisance, was dismissed by Special Term and is not at issue on this appeal. The second cause of action is based on Article 23, Title II, of the Public Health Law, entitled "Houses of Prostitution: Injunction and Abatement". Title II allows a district attorney to bring an action to per-

[1] While the owner of the premises, Charles Ottaviano, is also a named defendant in this action, this appeal concerns only the activities of Cloud Books, and any use of "defendant" refers to it.

manently enjoin conduct constituting a nuisance, as defined in Public Health Law §2320, which provides:

> "1. Whoever shall erect, establish, continue, maintain, use, own or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.
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> 2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided."

Sections 2321-2328 set forth the procedure to be followed for the trial of an action for a permanent injunction, the scope of such an injunction, and the penalties for violating it. Section 2329 provides that where a nuisance, as defined in section 2320, is established, the final judgment must include an order of abatement, which "shall direct" the removal and sale of all fixtures or movable property used in conducting the nuisance and "shall direct the effectual closing of the [premises] against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released as hereinafter provided." Section 2332 provides that a court may cancel an order of abatement if the owner of the premises pays all the costs of the proceeding and files a bond for the full value of the property.

The complaint alleges that defendant has been "maintaining, using and occupying" the premises in question as well as the "furniture, fixtures and personal property contained therein" "for the purpose of lewdness, assignation and prostitution." The

relief sought includes the permanent injunction and order of abatement provided for by statute.[2]

Defendant moved for partial summary judgment on the statutory cause of action, arguing that Title II was intended to cover only houses of prostitution, and thus was inapplicable to a store selling books and magazines, and that the relief requested, in particular the order of abatement, would in any event constitute a prior restraint prohibited by the First Amendment to the United States Constitution and article I, section 8 of the New York State Constitution. Though defendant's verified answer denies the allegations of sexual activity in the bookstore and states that even if any such activity did occur, it was not authorized or condoned by its employees, for purposes of this motion it admits the truth of these allegations.

Special Term denied the defendant's motion for summary judgment, holding that Title II could apply to a bookstore if there was a factual finding that the premises were "used for the purpose of lewdness, assignation or prostitution," and that none of the relief requested would work an impermissible prior restraint. The Appellate Division affirmed, holding that the statute could be applied whenever the plaintiff established "a consistent pattern of conduct sufficient to prove that the premises are being employed for a proscribed use," (101 AD2d 163, 168), and rejecting defendant's constitutional argument.[3] That court then granted defendant's motion for leave to appeal to us, and, pursuant to CPLR 5713, certified that following questions:

"(1) Whether Title II, Article 23 of Public Health Law is applicable to enjoin nuisance occurring on premises other than a house of prostitution?

(2) Do statute's mandatory closure provisions constitute

[2] The complaint also sought a preliminary injunction, but this relief was denied by the trial court and that order was affirmed by the Appellate Division.

[3] In a concurring opinion, Justice Green expressed the view, urged by the partial dissent here, that the constitutional issue was premature, as defendant might prevail at trial and thus never be subjected to an order of abatement. Plaintiff, however, is not merely seeking to obtain a ruling on the constitutionality of an event which "is beyond the control of the parties and may never occur" (*New York Public Interest Research Group* v *Carey*, 42 NY2d 527, 531), as the District Attorney is actually seeking to obtain the very result which defendant asserts would be unconstitutional. Furthermore, where a challenged action would restrict a party's First Amendment freedoms or might deter the exercise of such rights by others, an actual controversy may exist even though the party has yet to be subjected to any restriction of First Amendment freedoms (see, e.g., *Secretary of State of Maryland* v *Joseph H. Munson Co.*, 104 S.Ct. 2839; *Younger* v *Harris*, 401 US 37, 41; *Thompson* v *Wallin*, 301 NY 476, affd, *sub nom Adler* v *Board of Education*, 342 US 485). Thus, we agree with the majority at the Appellate Division that a defendant in a civil action may move for summary judgment on a cause of action on the ground that the relief sought would be unconstitutional, at least where, as here, there are First Amendment interests asserted.

Our adjudication of the First Amendment issue seems particularly appropriate under the circumstances of this case, as the unconstitutional restraint would have already occurred and the issue would likely be moot by the time of any post-trial review by us.

an impermissible prior restraint?"[4]

II

The first version of what is now Title II was enacted in 1914 as Article 17-a of the Public Health Law, and was entitled "Suppression of Certain Nuisances" (L. 1914, ch. 365,51). The 1914 statute provided for only injunctive relief, and was aimed at any building in which "assignation or prostitution" was conducted. In 1927, the Legislature, apparently not content with the effectiveness of the 1914 statute, repealed that version and enacted a statute (Title 17-a) which covered any building used for "lewdness, assignation or prostitution" and provided for an order of abatement (see L. 1927, ch. 670). The present version of Title II is essentially a reenactment of the 1927 statute, and there has been no change with respect to its applicability (see L. 1953, ch. 879). New York was not alone in passing a "nuisance abatement" statute in the early 20th century, as statutes virtually identical to the 1927 act were enacted in numerous states, all modeled after a 1909 Iowa law (see generally, *State ex rel. Cahalan* v *Diversified Theatrical Corp.*, 396 Mich. 244, 240 NW2d 460, 461-462).

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[4] We will interpret the first question as asking more specifically whether Title II may be applicable based on the allegations in this complaint, and thus the question raises an issue of law decisive of the appeal. (See Cohen and Karger, *Powers of the New York Court of Appeals*, §87). Furthermore, even though questions of fact remain to be determined at trial, the second question is properly before us because it is undisputed that defendant's store is, in fact, a "bookstore" selling materials protected by the First Amendment. The District Attorney's complaint refers to defendant's business as including the sale of books, magazines and periodicals, alleges that literature of "an explicitly sexual nature" is sold at the store, and stresses in its brief to this Court, as well as in an affidavit submitted to Special Term in opposition to defendant's motion for partial summary judgment, that this action has been brought "not *because* the premises is a bookstore, but *in spite* of that fact." Additionally, the lower courts have characterized the store as a "bookstore". Thus, an affirmative answer to this question would mandate a modification of the Appellate Division order regardless of what conduct taking place within the bookstore is later proved at trial (cf. *Patrician Plastic Corp* v *Bernadel Realty Corp.*, 25 NY2d 599).

Defendant's first argument with respect to the scope of Title II is that it applies only to places which are houses of prostitution, as that term is commonly known. Defendant bases this argument on the title of Title II ("House of Prostitution: Injunction and Abatement") and the titles of the individual sections ("Houses of Prostitution . . ."), on parts of the legislative history of the 1927 act which reveal a concern for such places, and on language in several decisions from other states suggesting this limited scope. None of these contentions is persuasive. While the title of a statute might in some cases aid in its interpretation, it is the language of the actual statutory provisions which determines the meaning of the act. (see, e.g., *Squadrito* v *Griebsch*, 1 NY2d 471, 475). Here, section 2320, by its terms, covers any building used for the purpose of lewdness, assignation or prostitution as well as a building in which any such conduct occurs, and is thus unambiguously broader in reach than its title would suggest.[5]

Defendant's reliance on the legislative history of the 1927 act is unavailing. While it is clear that the legislature intended that the statute could be utilized to shut down houses of prostitution, there is no indication that it intended that its application be restricted to that function. Rather, at the time of concern about the spread of "red light districts" and "commercialized vice," the legislature in 1927, as noted above, actually broadened the reach of the statute. Thus, there is no legislative intent which would override the plain meaning of section 2320. While decisions from other states interpreting virtually identical statutory provisions are instructive, the weight of such authority does not support defendant's argument. In most of the cases on which defendant relies, (see *State ex rel. Clemens* v *Toneca, Inc.*, 265 NW2d 909

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[5] We further note that the titles for the statutes as a whole and the individual sections were not enacted in 1927 but were instead added in 1939 when Article 17-a was changed to Article 17 (see L. 1939, ch. 210), which adds to our reluctance to place any emphasis on them.

[Iowa]; *State ex rel. Cahalan* v *Diversified Theatrical Corp.*, 396 Mich. 244, 240 NW2d 460; *State ex rel. English* v *Fanning*, 97 Neb. 224, 149 N.W. 413; *State ex rel. Carroll* v *Gatter*, 43 Wash2d 153, 260 P2d 360), the courts held only that the nuisance abatement statute did not apply either because none of the acts cited by the plaintiffs was within the conduct proscribed by the statute or because there had been no evidence to show that the premises were used "for the purpose of" lewdness, assignation or prostitution. In numerous other cases, courts in other states have applied their statute to places which were not houses of prostitution, as the term is commonly known (see, e.g., *State* v *B. Bar Enterprises, Inc.*, 133 Ariz. 99, 649 P2d 978; *People ex rel. Van De Kamp* v *American Art Enterprises, Inc.*, 75 Cal. App. 3d 523, 142 Cal. Rptr. 338; *People* v *Adult World Bookstore*, 108 Cal. App. 3d 404, 166 Cal. Rptr. 519; *State ex rel. Wayne County Prosecuting Attorney* v *Levenburg*, 406 Mich. 476, 280 NW2d 810; *Commonwealth ex rel. Lewis* v *Allouwill Realty Corp.*, ____ Pa. Super ____, 478 A2d 1334). While there are few cases from this state on point, in at least two instances other than the present action, the lower courts have applied Title II to a location despite the presence of some other legitimate activity on the premises (see, *People* v *Macbeth Realty Co.*, 63 AD2d 908; *People* v *Morbel Realty Corp.*, 87 Misc2d 989).

Defendant's second argument concerning the scope of Title II is that the People must show that the "primary purpose" for which the building in question is being used is lewdness, assignation or prostitution, an allegation not made by the plaintiff. Again, however, defendant's contention is refuted by the language of section 2320. The language "for the purpose of" in section 2320(1) does not support defendant's position, as a building clearly can be used for more than one purpose, and the language "in or upon which any lewdness . . . [is present]" flatly contradicts it. To the extent that the Supreme Court of Washington established a "primary purpose" test in *State ex rel. Carroll* v *Gatter, supra*, we decline to follow that decision. We note instead the application of other states' statutes under circumstances similar to those alleged here in *People* v *Adult World Bookstore, (supra), People ex rel. Van De Kamp* v *American Art Enterprises, Inc., (supra), Commonwealth* v *Croatan Books, Inc.*, (____ Va ____, 323 SE2d 86), and *Commonwealth ex rel. Lewis* v *Allouwill Realty Corp., (supra).*

Thus, we reject defendant's contentions as to the scope of Title II and agree with the lower courts that plaintiff's allegations raise a question of fact as to its applicability here. That is not to say, and we do not hold, that any premises on which an isolated act of lewdness, assignation or prostitution occurs is subject to the remedies of Title II. Rather, we agree with the Appellate Division that "the People will have to show a consistent pattern of conduct sufficient to prove that the premises are being employed for a proscribed use." The most significant factors in making this factual determination will be the frequency of the conduct, the knowledge or even encouragement by the defendant of its existence, and the extent of the benefit, direct or indirect, derived by defendant from such activity. Finally, the fact that defendant's bookstore is an "adult" bookstore featuring sexually explicit material is by itself of no relevance, as nothing in section 2320 supports the application of Title II to a premise based on the content of material sold or displayed there (see, *People ex rel. Busch* v *Projection Room Theater*, 17 Cal. 3d 42, 3 Cal. Rptr. 328, 550 P2d 600, 611, cert. denied, 429 U.S. 911; *People* v *Goldman*, 7 Ill. App. 3d 253, 287 NE2d 177; *State ex rel. Cahalan* v *Diversified Theatrical Corp., supra; State* v *Morley*, 63 N.M. 267, 317 P2d 317).

III.

The additional relief requested by the District Attorney pursuant to Title II is an order of abatement under section 2329 which would close for all purposes, for a period of one year, the prem-

ises where defendant operates its bookstore. Defendant's constitutional argument is that closure of the premises will prevent the sale of materials protected by the First Amendment, and thus constitutes an impermissible prior restraint.[6]

It is beyond dispute that the activity of selling books is entitled to the protections of the First Amendment (see, e.g., *Smith* v *California*, 361 U.S. 147), and any limitation by a State of First Amendment freedoms must be premised upon "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . ." (*NAACP* v *Button*, 371 U.S. 415, 438). A regulation which suppresses speech in advance of its publication or distribution may be subject to particularly close scrutiny as a prior restraint (see, e.g., *Southeastern Promotions, Ltd.* v *Conrad*, 420 U.S. 546, 558-559; *Near* v *Minnesota*, 283 U.S. 697). The Supreme Court has stated that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" (*Bantam Books, Inc.* v *Sullivan*, 372 U.S. 58, 70), and has justified this treatment of prior restraints on "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand" (*Southeastern Promotions, Ltd.* v *Conrad*, *supra*, 420 U.S. at 559 [emphasis in original]). A statutory scheme subject to this scrutiny will be upheld only if it falls within certain narrow categories established by the Supreme Court and contains proce-

[6] The provisions of section 2332 concerning relief from a closure order do not negate defendant's argument, as that section provides only that the court *may* cancel the order upon certain conditions being met. Additionally, these conditions require that the owner of the premises take certain steps, including the posting of a bond, thus making relief for a lessee, such as defendant, dependant upon the discretion and financial status of the owner (see, Note, *Pornography, Padlocks and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 NYU L. Rev. 1478, 1507 [hereafter cited as "Padlocks and Prior Restraints"]).

dural safeguards designed to prevent the establishment of a censorship system (*id.*; see Note, *Padlocks and Prior Restraints*, *supra*, n. 6, at 1495).

The lower courts rejected defendant's argument that the principles set forth in *Near* and *Southeastern Promotions* applied to the closure of its bookstore. Special Term stated that closure would involve only the abatement of a nuisance, and would not be a prior restraint of presumptively protected materials, and the Appellate Division similarly noted that, by requesting closure of the bookstore, "the People seek only to employ the statute to enjoin illegal conduct occurring on the premises, not to regulate the content of materials disseminated in the store" (101 AD2d at 172). The District Attorney urges affirmance on this ground, arguing that closure of the bookstore would have no First Amendment implications.

Courts have broadly recognized that curtailment of a person's ability to exercise freedom of expression based on prior actions can raise First Amendment concerns. In *People* v *Taub* (37 NY2d 530, 534), we held that a municipality's denial of a permit for the use of sound amplification equipment based on the applicant's prior conviction of a crime was an impermissible prior restraint. Many courts have held that denial or revocation of a license to operate a movie theater on the ground of a conviction for showing or distributing obscenity violates the First Amendment rights of the applicant or licensee (see, e.g., *Gayety Theatres, Inc.* v *City of Miami*, 719 F2d 1550; *Cornflower Entertainment, Inc.* v *Salt Lake City Corp.*, 485 F. Supp. 777; *Natco Theatres, Inc.* v *Ratner*, 463 F. Supp. 1124; *Perrine* v *Municipal Court*, 5 Cal. 3d 656, 97 Cal. Rptr. 320, 488 P2d 648, cert. denied 404 U.S. 1038; *Alexander* v *City of St. Paul*, 303 Minn. 201, 227 NW2d 320; *Hamar Theatres, Inc.* v *City of Newark*, 150 N.J. Super. 14, 374 A2d 502). These courts based their decisions on the prior restraint doctrine, stressing the effect that the action would have on pre-

sumptively protected films. As stated by the Supreme Court of California, "to permit denial of a license because of a past conviction [for selling obscene material] would do more than create a hazard to protected freedoms; it would suppress them altogether. The penalty for [the criminal violation] does not include a forfeiture of First Amendment rights" (*Perrine* v *Municipal Court, supra,* 5 Cal. 3d at 665).

In numerous other cases, courts have considered the constitutionality of provisions of statutes which provide for an order of abatement closing a bookstore or movie theater for one year based on a showing that some obscene material was sold or exhibited on the premises (see generally, Note, *Padlocks and Prior Restraints, supra* n. 6). Virtually every court which has addressed this question has held that such a provision violates the First Amendment (see, e.g., *General Corporation* v *State ex rel. Sweeton,* 294 Ala. 657, 320 So. 2d 668, cert. denied, 425 U.S. 904; *People ex rel. Busch* v *Projection Room Theater,* 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P2d 600, cert. denied, 429 U.S. 922; *Sanders* v *State,* 231 Ga. 608, 203 SE2d 153; *State* v *A Motion Picture Entitled "The Bet",* 219 Kan. 64, 547 P2d 760; *Gulf States Theatres of Louisiana, Inc.* v *Richardson,* 287 So.2d 480 [La.]; *State ex rel. Andrews* v *Chateaux,* 296 N.C. 251, 250 SE2d 603, vacated on other grounds, 445 U.S. 947; *City of Minot* v *Central Avenue News, Inc.,* 308 NW2d 851 [N.D.], app. dismissed, 454 U.S. 1117; *State ex rel. Field* v *Hess,* 540 P2d 1165 [Okl.]). Again, the rationale underlying these decisions is the prior restraint doctrine set forth in *Near* and subsequent Supreme Court cases. Essentially, the Courts have recognized that the mere fact that some of the material sold in a store can be suppressed as obscene does not provide a constitutional basis for labeling the store itself a "nuisance" and thus subject to closure.

The District Attorney cites two cases which have upheld closure provisions pertaining to obscenity, relying particularly on

State ex rel. Ewing v *"Without a Stitch"* (37 Ohio St.2d 95, 307 NE2d 911, app. dismissed, 421 U.S. 923). The court in *Ewing,* however, in upholding the closure of a movie theater for one year based on the showing of one obscene film, stated that the "nuisance" was the exhibition of the particular film declared obscene, and thus the owner could obtain release from the closure order by demonstrating that this one film would no longer be shown (37 Ohio St.2d at 105; see, *State ex rel. Leis* v *William S. Barton, Co.,* 45 Ohio App. 2d 249, 253, 344 NE2d 342).[7]

The District Attorney also argues that the obscenity closure cases are not dispositive as they concern a restraint based on the content of material whereas in the present case, closure would be based on conduct and would be aimed at preventing recurrence of that conduct. We agree that the highest degree of protection is most appropriate where the government attempts to restrain future expression because of its content or the content of past expression (see, e.g., *New York Times Co.* v *United States,* 403 U.S. 713; *Organization for a Better Austin* v *Keefe,* 402 U.S. 415). We do not agree, however, that the mere fact that closure of defendant's bookstore would not be based on the content of any materials sold there means that defendant's First Amendment rights would not be implicated. An ordinance which prohibited all exercise of First Amendment rights in all public areas would be just as unconstitutional as one barring only expression with some particular content.

Although the fact that a premises houses a bookstore rather than some other commercial enterprise does not provide it with immunity from all regulation, bookstores operating as such may

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[7] The other case cited by the District Attorney is *State ex rel. Kidwell* v *U.S. Marketing, Inc.,* (102 Idaho 451, 631 P2d 622, probable jurisdiction noted, 454 U.S. 1140, app. dismissed on motion of appellant, 455 U.S. 1009), in which the Idaho Supreme Court upheld the closure, stating that it was not a prior restraint, but was instead merely an *in rem* punishment imposed on the property, analagous to a civil forfeiture of property used in a crime.

not simply be equated with ordinary nuisances or with personal property subject to forfeiture (see, e.g., *Vance* v *Universal Amusement Co.*, 445 U.S. 308, 315; *Natco Theatres, Inc.* v *Ratner*, 463 F. Supp. 1124, 1130; *Commonwealth* v *Croatan Books, Inc.*, ____ Va. ____, 323 SE2d 86, 88). What the District Attorney's argument fails to address is the effect which closure of the bookstore would have on protected expression. Prior restraints or other restrictions on First Amendment rights may be present not only where a statute directly prohibits expression but also where the impact of the statute curtails the exercise of these rights (see, e.g., *Secretary of State of Maryland* v *Joseph H. Munson Co.*, 104 S. Ct. 2839, 2851 n. 12; *Southeastern Promotions, Ltd.* v *Conrad, supra*, 420 U.S. at 552, 556, n. 8; *Healy* v *James*, 408 U.S. 169, 183).[8]

Thus, while the reasons underlying the closure of a bookstore under Title II are relevant in determining the constitutionality of the closure, good motivations alone are not dispositive. In *Matter of Nicholson* v *State Commission on Judicial Conduct* (50 NY2d 597, 607), we stated that "[a] proper analysis calls for examination of the degree of interference with the First Amendment interests, the strength of the governmental interest justifying the restriction and the means chosen to prevent the asserted evil." The Supreme Court has similarly held that where a law designed to serve a legitimate interest effectively limits the exercise of First Amendment rights, it will be invalidated if the interest could be served by means not affecting those rights (see, e.g., *Village of Schaumberg* v *Citizens For Better Environment*, 444 U.S. 620, 637; *Shelton* v *Tucker*, 364 U.S. 479, 488).

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[8] That defendant would still be free to use any other premises to sell books is of little relevance, in part because the availability and practicality of an alternate site will always be speculative, (see, Note, *Padlocks and Prior Restraints, supra* n. 6, at 1506), but more fundamentally because "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place" (*Southeastern Promotions, Ltd.* v *Conrad, supra*, 420 U.S. at 456; *Schneider* v *State*, 308 U.S. 147, 163).

Our test set forth in *Nicholson* most closely resembles the Supreme Court's decision in *United States* v *O'Brien*, (391 U.S. 367). In *O'Brien*, the Court held that where "speech" and "nonspeech" elements are combined in the same course of conduct, a law aimed at the "nonspeech" elements, but having an "incidental" effect on the protected expression, is justified

> "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest". (391 U.S. at 367)

The Supreme Court has applied the *O'Brien* test, or a substantially similar analysis, in reviewing zoning ordinances which have a purpose other than suppressing protected speech, but which have incidental effects on the speech, (see, *Schad* v *Borough of Mount Ephraim*, 452 U.S. 61; *Young* v *American Mini Theatres*, 427 U.S. 50 [plurality opinion]; *id.*, at 79 [Powell, J. concurring on basis of *O'Brien*]), and, most recently, in examining a city ordinance, enacted for aesthetic purposes, which prohibited the posting of signs on public property (*Members of the City Council* v *Taxpayers for Vincent*, 104 S. Ct. 2118).

Courts in three other states have addressed the constitutionality of closure orders provided for in their statutory equivalents of Title II, as applied to a premise used for protected expression. In two of these cases, the court determined that the appropriate test was that set forth in *O'Brien* (see, *People ex rel. Van De Kamp, supra*, 75 Cal. App. 3d at 531; *Commonwealth* v *Croatan Books,*

Inc., supra, 323 SE2d at 88).[9] We agree with these decisions, and thus turn to an application of the four-part *O'Brien* test.

A statute aimed at the abatement of a public nuisance is certainly within the police power of the state (see, *Lane* v *City of Mount Vernon,* 38 NY2d 344; *Lawton* v *Steele,* 119 N.Y. 226, aff'd, 152 U.S. 133). We also have no difficulty concluding that restriction of the conduct alleged in the complaint furthers an important governmental interest. Prostitution is criminal activity no matter where it occurs (Penal Law §230.00), and the other sexual activity alleged is prohibited in public places (see, Penal Law §245.00; cf., *People* v *Adult World Bookstore, supra,* 108 Cal. App. 3d at 410 ["Not everyone who enters a dirty bookstore . . . expects to be molested, propositioned, or subjected to an open view of live homosexual acts of others."]). Additionally, the interest in restricting this conduct is clearly unrelated to the suppression of free expression. Thus we find, as did the courts in *Van De Kamp* and *Croatan Books,* that the first three elements of the *O'Brien* test are satisfied.

In *Croatan Books,* the court concluded that closure of the premises involved was necessary to abate the sexual conduct proscribed by its statutory provisions, and thus found that the fourth element of the *O'Brien* test was satisfied as well. The court in *Van De Kamp,* to the contrary, found closure to be overbroad and thus unconstitutional. In *Croatan Books,* the court specifically noted that, following an initial hearing, the trial court had ordered temporary injunctive relief designed to eliminate the nuisance without closing the premises, and that the evidence at a second hearing showed that this relief had been ineffective. The

[9] In the third case, *Commonwealth ex rel. Lewis* v *Allowill Realty, (supra),* the court recognized that closure might have an incidental effect on the dissemination of protected materials, but summarily rejected a First Amendment argument, noting only that it was "conceivable" that the bookstore operator could continue to sell his books elsewhere (478 A2d at 1338-1339).

court was thus able to conclude that "less restrictive remedial measures failed to abate what the trial court had unequivocally found . . . to be a nuisance" (323 SE2d at 90). In the present case, there has been no "less restrictive" relief imposed, nor has the District Attorney demonstrated that the injunctive relief provided for in Title II would be insufficient to abate the nuisance. If the District Attorney succeeds at trial, he will be entitled to a permanent injunction against the existence or maintenance of a nuisance in violation of section 2320 and the injunction will be binding upon defendant. A violation of any of the provisions of the injunction would be a contempt, punishment for which could include imprisonment (see sections 2327, 2328).

Under these circumstances, we conclude that closure of defendant's bookstore is not essential to the furtherance of the purposes underlying Title II, and is thus an unconstitutional restraint on defendant's First Amendment rights. While closure might be the most efficient remedy, "considerations of this sort do not empower a [State] to abridge freedom of speech . . ." (*Schneider* v *State,* 308 U.S. 147, 164).

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Both certified questions are answered in the affirmative. The order of the Appellate Division is modified to grant defendant partial summary judgment dismissing those portions of the second cause of action seeking an order directing the closing of the premises in question.

People ex rel Arcara v. Cloud Books, Inc.

JASEN, J. (dissenting in part)

While I join the majority insofar as it holds that the intended application of Article 23, Title II of the Public Health Law is broad enough to encompass a bookstore or any other establishment employed for the conduct proscribed in section 2320(1),

nevertheless I do not believe that the constitutional issue is ripe for resolution at this time. Inasmuch as there has been neither a trial nor a final judgment imposing any sanction upon defendant, I agree with Justice Green's concurring opinion below, that the constitutional question ought not to be anticipated and decided until or unless it need be.

At this point in the litigation, only defendant's motion for summary judgment has been denied. If defendant should obtain a judgment after a full trial, the constitutionality of closing defendant's bookstore for a period of one year pursuant to section 2329 would never be placed in issue. If, on the other hand, judgment should be awarded to plaintiff, there is still no certainty that the constitutionality of the closure would have to be decided. The one year closure might be avoided altogether by application of the alternative provided in section 2332. Pursuant thereto, the court may order the premises released to the owner if the latter pays the costs of the proceedings and files a bond for the full value of the property.

Accordingly, the closure challenged by defendant is presently speculative and resolution of its constitutionality seems unnecessary at this point. Imposition of the closure may never occur, for it is contingent upon future events which may never come to pass. Thus, it is my view that a declaration regarding the validity of the closure provision of section 2329 is premature, that it may never resolve anything between the parties, and that it, thereby, constitutes an advisory opinion upon still uncertain state of facts. (See, *Matter of New York State Inspection, Security and Law Enforcement Employees* v *Cuomo*, 64 NY2d 233, 240; *New York Public Interest Research Group* v *Carey*, 42 NY2d 527, 530-531; cf. *Ashwander* v *Tennessee Valley Authority*, 297 US 288, 325; *Electric Bond & Share Co.* v *Securities and Exchange Commission*, 303 US 419, 443).

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Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. Questions certified answered in the affirmative. Opinion by Chief Judge Wachtler in which Judges Meyer, Simons, Kaye and Alexander concur. Judge Jasen dissents in part and votes to affirm in an opinion. Judge Titone took no part.

Decided June 13, 1985

APPENDIX C — ORDER OF APPELLATE DIVISION, FOURTH DEPARTMENT, DATED APRIL 12, 1984

[Order of the Fourth Department entered April 12, 1984, denying appellant's motion for partial summary judgment]

Supreme Court of the State of New York
Appellate Division, Fourth Judicial Department

PRESENT: DILLON, P.J., CALLAHAN, DOERR, GREEN, MOULE, JJ.

People of the State of New York, ex rel Richard J. Arcara, District Attorney of Erie County, Respondent,

v.

Cloud Books, Inc., d/b/a Village Book and News Store, Appellant, Charles A. Ottaviano, Blanche Dudley, and All Other Persons Unknown Claiming Ownership, Right, Title or Interest in the Property Affected in this Action, Defendants.

The above named Cloud Books, Inc., d/b/a Village Book and News Store having appealed to this Court from certain parts of an order of the Supreme Court, entered in the Erie County Clerk's office on June 14, 1983 and said appeal having been argued by Paul Cambria of counsel for appellant, John DeFranks of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be and the same hereby is affirmed without costs.

Opinion by Moule, J., which is hereby made a part hereof; Dillon, P.J., Callahan, and Doerr, JJ. concur; Green, J . concurs in result, in an Opinion.

Entered: APR 12 1984

CARMEN S. LEONE, *Clerk*

APPENDIX D — OPINION OF THE APPELLATE DIVISION, FOURTH DEPARTMENT, DATED APRIL 12, 1984

THE PEOPLE OF THE STATE OF NEW YORK ex rel. RICHARD J. ARCARA, as District Attorney of Erie County, Respondent, v CLOUD BOOKS, INC., Doing Business as VILLAGE BOOK AND NEWS STORE, Appellant, et al., Defendants.

Fourth Department, April 12, 1984

SUMMARY

APPEAL from an order of the Supreme Court at Special Term (Thomas P. Flaherty, J.), entered June 14, 1983 in Erie County, which (1) denied a motion by defendant Cloud Books, Inc., for partial summary judgment, and (2) granted a motion by plaintiff for a protective order.

People ex rel. Arcara v Cloud Books, 119 Misc 2d 505, affirmed.

APPEARANCES OF COUNSEL

Lipsitz, Green, Fahringer, Roll, Schuller & James (Paul Cambria and *Mary Good* of counsel), for appellant.

Richard J. Arcara, District Attorney (John DeFranks and *Louis A. Haremski* of counsel), for respondent.

OPINION OF THE COURT

MOULE, J.

The question presented on this appeal is whether title II of article 23 of the Public Health Law may be applicable to enjoin a nuisance occurring on a premises used as a bookstore.

Defendant Cloud Books, Inc., operates a bookstore, the Village Books and News, located on Delaware Avenue in the Village of Kenmore.[1] It sells books, magazines and novelties of a sexually frank nature and maintains coin-operated movie machines which show explicit sexual material. An investigation concerning activities occurring on the premises was undertaken by the Erie County District Attorney in September, 1982. This investigation was conducted by an Erie County Sheriff who, while working undercover, visited the bookstore several times between September 13 and October 1, 1982. During this period of time, the undercover officer witnessed numerous lewd and illegal acts committed by unidentified patrons of the premises. In an affidavit describing these acts, the officer stated that he had brought them to the attention of store employees but had been told by the employees that they were not concerned with such action.

Subsequently, the District Attorney brought suit on behalf of the People alleging the foregoing acts and setting forth two causes of action: to abate a nuisance under common law and to enjoin the maintenance of a nuisance in violation of title II of article 23 of the Public Health Law. The ultimate relief sought under both causes of action is a permanent injunction against illicit conduct occurring on the premises. Additionally, under the statutory cause of action, plaintiff seeks closure of the premises for a period of one year and the seizure and sale of all furniture and fixtures used therein (Public Health Law, §§ 2320 *et seq.*).[2] In its verified answer, defendant, through both its attorney and corporate president, specifically denied each factual allegation re-

[1] Charles Ottaviano, owner of the premises, is also named as a defendant in this action. All future references to "defendant" will be to defendant Cloud Books, Inc.

[2] Plaintiff's complaint also sought a preliminary injunction restraining defendant from maintaining a nuisance in violation of title II of article 23 of the Public Health Law. This application was denied by the trial court and that denial was subsequently affirmed by this court (96 AD2d 751).

garding the alleged sexual activity and asserted that, even if proven, those acts were not sanctioned or otherwise countenanced by defendant or its employees. Further, defendant stated in its answer that its employees were required to maintain a strictly enforced policy of disallowing any such activity on the premises.

Defendant then moved for partial summary judgment on the statutory cause of action, arguing that the statute was totally inapplicable to a bookstore and, alternatively, that the mandatory closure provisions of the statute would unconstitutionally impinge upon the bookstore's protected First Amendment activities. Special Term rejected both of defendant's arguments against the potential applicability of the statute and denied its motion.[3]

Defendant raises two contentions on this appeal: (1) that title II of article 23 of the Public Health Law is inapplicable to its premises; and (2) that the mandatory closure provisions of article 23 (tit II, § 2329) of the Public Health Law impermissibly infringe upon its First Amendment freedoms.

[1] The question presented by the first contention is whether title II of article 23 of the Public Health Law, entitled "Houses of Prostitution: Injunction and Abatement", may be applicable to a bookstore. Section 2320 of the Public Health Law defines the scope of this title:

"1. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.

[3] Special Term's order also granted plaintiff's motion for a protective order vacating defendant's notices to take depositions. While defendant appealed from "each and every part" of Special Term's order, no issue has been raised on this appeal with respect to this aspect of the court's order.

"2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided."

Defendant argues that the statute is inapplicable to a bookstore since it is not a "place used for the purpose of lewdness, assignation, or prostitution". Defendant further maintains that, because the statute is entitled "Houses of Prostitution", it may only be employed against houses of prostitution. These arguments are without merit.

Defendant's argument that the statute does not apply to a bookstore because it is not a "place used for the purpose of lewdness, assignation, or prostitution" presupposes that the primary use of the subject premises must be connected with the stated illegal activities. No such limitation is, however, provided by the express language of the statute. A premises may have multiple purposes and, if one of those is the promotion of "lewdness, assignation, or prostitution", it will run afoul of section 2320 of the Public Health Law. This interpretation is supported by a consistent reading of the statute's two subdivisions. While subdivision 1 of section 2320 refers to persons "guilty of maintaining a nuisance", subdivision 2 goes on to provide that the building or ground "upon which *any* lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists" (emphasis added) constitutes a nuisance. If the statute were intended to apply exclusively to houses of prostitution, it is inconceivable that the Legislature would have given such a broad definition to the term "nuisance". As for the title of the act, it is fundamental that the substance of a statute is to be determined by its provisions and not by its title (*Squadrito v Griebsch*, 1 NY2d 471; see, also, McKinney's Cons Laws of NY, Book 1, Statutes, § 13).

While there is little precedent in New York[4] for applying the Public Health Law to premises other than a house of prostitution (*People ex rel. Lemon v Elmore*, 256 NY 489; *People ex rel. Rudd v Rizzo*, 146 Misc 675), similar statutes in three other States have been broadly construed to be applicable to various premises other than houses of prostitution. In *State ex rel. Carroll v Gatter* (43 Wn 2d 153, 160), the Supreme Court of Washington discussed the general applicability of its red light abatement statute:[5]

"The statute is not directed to the abatement of commercial eroticism — that is governed by the criminal statutes. It is directed to the abatement of premises which, by reason of sufficient happenings therein, have absorbed and taken the character of the acts committed, and have in fact become houses of lewdness, assignation, or prostitution.

"But the operator of such premises cannot escape the force of the abatement statute by calling the premises a 'hotel,' 'apartment,' 'club,' or giving it any name which purports to identify it as a place of lawful and legitimate business; nor can certain immunity be gained by showing mathematically that the principal

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[4] In *People v Macbeth Realty Co.* (63 AD2d 908), the First Department upheld the application of the statute to certain rooms in a hotel which were used for prostitution (cf. *Commissioner of Dept. of Bldgs. of City of N. Y. v Sidne Enterprises*, 90 Misc 2d 386).

[5] The Washington statute was worded almost identically to section 2320 of the Public Health Law. It provided: "Whoever shall erect, establish, maintain, continue, use, own or lease any building or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and the building or place, or the ground itself, in or upon which lewdness, assignation or prostitution is conducted, permitted or carried on, continued or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided" (Wn Rev Code, former § 7.48.050, Wn Rev Stat, § 946-1).

business of the establishment is legitimate. That fact is one to be considered by the court in reaching its ultimate finding, but is not necessarily, of itself, sufficient to be conclusive. The legitimate and the illegitimate activities occurring on the premises may be so intermingled that the lesser activity is predominant and controls the determination that the premises are, or are not, houses of lewdness, assignation or prostitution."

While the premises involved in the Washington case was a hotel which was alleged to have been used for prostitution, the court's analysis unequivocally implies that the statute could be applied to any premises where a sufficient degree of illegitimate activity transpires.

In *State ex rel. Wayne County Prosecuting Attorney v Levenburg* (406 Mich 455), the Supreme Court of Michigan held that proof of numerous instances of accosting and soliciting for purposes of prostitution at a bar was sufficient to sustain a finding that the bar constituted a nuisance under Michigan's abatement act[6] and was, hence, subject to abatement. Finally, in *People ex rel. Van De Kamp v American Art Enterprises* (75 Cal App 3d 523), the Court of Appeal for the Second District of California

[6] Michigan's act provides in pertinent part: "Any building, vehicle, boat, aircraft or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons * * * is hereby declared a nuisance and * * * shall be enjoined and abated as hereinafter provided, and as provided in the court rules. Any person, or his servant, agent or employee who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or by any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance" (Mich Compiled Laws Ann, § 600.3801).

applied the California Red Light Abatement Law[7] to a premises used for the storage and distribution of certain publications (see, also, *People v Mitchell*, 64 Cal App 3d 336, where the same court found the California act applicable to enjoin lewd acts of theater patrons).

The question of whether any given premises, including defendant's bookstore, is subject to title II of article 23 of the Public Health Law is necessarily a question of fact. Resolution of this question will depend upon the degree of illicit activity which plaintiff can prove occurred at the store. In addressing the People's burden of proof under the Washington statute, the court in *State ex rel. Carroll v Gatter* (43 Wn 2d 153, 160, *supra*) stated: "To sustain the application of the act, it must be shown to the satisfaction of the court, by a preponderance of the evidence, that the premises were being used as a house of lewdness, assignation, or prostitution as that term is generally understood. The 'use' of the premises of which the statute speaks, requires more than a showing that sporadic acts of prostitution occurred therein." We believe that this is an appropriate standard of proof for the People to be held to under the Public Health Law. While it will not be necessary for the People to demonstrate that the sole, or even dominant, use of the premises is devoted to the illegality prohibited by the statute, the People will have to show a consistent pattern of conduct sufficient to prove that the premises are being employed for a proscribed use.

Defendant's second contention is that, even if title II of article 23 of the Public Health Law may be applicable to a bookstore, its mandatory closure provisions impermissibly infringe upon de-

[7] The relevant portion of California's act provides: "Every building or place used for the purpose of * * * lewdness, assignation, or prostitution, and every building or place in * * * which acts of * * * lewdness, assignation, or prostitution, are held to occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance" (Cal Penal Code, § 11225).

fendant's First Amendment freedoms. Defendant cites three different arguments in support of this contention: first, that closure of the premises would violate defendant's right to the procedural safeguards of *Freedman v Maryland* (380 US 51); second, that closure would effect a prior restraint on protected speech (see, e.g., *Near v Minnesota*, 283 US 697); and, third, that closure would violate the overbreadth doctrine (see, e.g., *Broadrick v Oklahoma*, 413 US 601).

Defendant correctly maintains that if the mandatory remedy provided under this title, closure of the premises and sale of the fixtures,[6] would be constitutionally infirm when applied to a bookstore, then it would be entitled to summary judgment on the statutory cause of action. There would, of course, be no reason to allow this cause of action to be tried if, as a matter of law, there was no pssible basis upon which the People could prevail. This conclusion is supported by our holding in *Cosgrove v Cloud Books* (83 AD2d 789, 789-790), where we held that defendant was entitled to partial summary judgment where the relief sought would be "in clear violation of defendants' First Amendment rights".

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[6] Subdivision 1 of section 2329 of the Public Health Law provides, in pertinent part: "If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in any court, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance and shall direct the sale of such in the manner provided for the sale of chattels under execution, *and shall direct the effectual closing of the building*, erection or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released as hereinafter provided" (emphasis added). Section 2332 of the Public Health Law goes on to provide that the owner of the premises may have the order of abatement canceled upon his paying all costs of the proceeding, filing a bond in the full amount of the property's value, and abating the nuisance.

[2] Defendant's first argument in support of its second contention is that mandatory closure of the premises would violate the procedural safeguards of *Freedman v Maryland (supra)*. *Freedman* involved a challenge to a Maryland statute which required that motion pictures be submitted to a film review board for licensing. The object of the statute was to censor obscene films. The court held that such a system of content-based censorship could avoid constitutional infirmity only by providing for certain procedural safeguards. Concededly, title II of article 23 of the Public Health Law does not contain any of the procedural safeguards mandated by *Freedman*. This fact is, however, irrelevant since the purpose of this action is to enjoin illegal conduct occurring at the bookstore, not regulate the content of presumptively protected materials distributed by defendant. Since this case concerns conduct and not content, it is readily distinguishable from *Freedman* and the other cases relied upon by defendant (see, e.g., *Vance v Universal Amusement Co.*, 445 US 308; *Cosgrove v Cloud Books, supra*). Accordingly, defendant's first constitutional argument is without merit.

Defendant's second argument in support of its second contention is that closure of the bookstore would operate as a prior restraint on protected speech. To support this argument, it relies upon a long line of cases standing for the proposition that abatement statutes, similar to New York's, may not be employed to prospectively enjoin constitutionally protected conduct because of the past distribution or exhibition of obscene magazines or films (*General Corp. v State ex rel. Sweeton*, 294 Ala 657, cert den 425 US 904; *People ex rel. Busch v Projection Room Theater*, 17 Cal 3d 42, cert den *sub nom. Van de Kamp v Projection Room Theater*, 429 US 922; *Mitchum v State ex rel. Schaub*, 250 So 2d 883 [Fla]; *Sanders v State*, 231 Ga 608; *State v A Motion Picture Entitled "The Bet"*, 219 Kan 65; *Gulf States Theatres of La. v Richardson*, 287 So 2d 480 [La]; *Cosgrove v Cloud Books, supra; State ex rel. Field v Hess*, 540 P2d 1165 [Okla]). Once again,

however, the critical distinction between this case and the authorities cited by defendant is the fact that plaintiff's action is directed at illegal conduct occurring on the premises and not at punishing defendant for any past promotion of obscenity. The ultimate question presented by defendant's argument is whether the closure provisions of title II of article 23 of the Public Health Law constitute a prior restraint when that article is applied to enjoin illegal activity occurring at a bookstore, and that activity is wholly unrelated to the dissemination of protected speech.

At the outset, it is necessary to examine what is meant by a prior restraint. In *Near* v. *Minnesota* (283 US 697, *supra*), the United States Supreme Court held that the Constitution prohibited an injunction against the further publication of a racist newspaper. The court found that the statute, which authorized the granting of an injunction against any "malicious, scandalous or defamatory" newspaper, was the essence of censorship. It went on to state: "The question of whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public' " (*Near v Minnesota, supra,* pp 713-714, quoting 4 Blackstone's Comm, p 151). The clear import of this language is that speech may not be restricted because of its content. This principle was reiterated by the Supreme Court in

Police Dept. of Chicago v Mosley (408 US 92, 95-96) where the court stated: "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content * * * To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co.* v. *Sullivan, supra* [376 US 254], at 270."

With these authorities in mind, we conclude that closure of the bookstore pursuant to title II of section 23 of the Public Health Law would not constitute a prior restraint on protected First Amendment speech since the People seek only to employ the statute to enjoin illegal conduct occurring on the premises, not to regulate the content of materials disseminated by the store. The mere fact that illegal activity or conduct occurs on the premises of a bookstore does not elevate every attempt to enforce the law on those premises to a question of constitutional dimension.[9] This conclusion is supported by the Supreme Court's decision in *Paris Adult Theatre I v Slaton* (413 US 49, 67) where the court stated: "Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at

[9] "By way of example, if a bookseller, having fallen behind on his property taxes, closes his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint upon his bookselling activities" (*State ex rel. Kidwell v U.S. Marketing,* 102 Idaho 451, 456).

high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

In reaching this conclusion, we recognize that another court, the Court of Appeal for the Second District of California, has reached a contrary result. In *People ex rel. Van De Kamp v American Art Enterprises* (75 Cal App 3d 523, *supra*), that court applied the California abatement statute to a building which was primarily used for publishing purposes, but which was also found to be a "nerve center" for arranging hundreds of acts of prostitution. While the court isued an injunction against further illegal activity on the premises, it expressly refused to close the building, the relief requested by the People and provided for by statute (Cal Penal Code, § 11230), on the ground that closure would constitute a prior restraint. The court's holding was based upon the Supreme Court's decision in *United States v O'Brien* (391 US 367, 376-377), where the court stated: "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Using the criteria set forth in *O'Brien (supra)*, the *American Art Enterprises* court found that the "incidental infringement upon First Amendment rights [was] 'greater than [that] essential to vindicate [the government's] * * * interests' " (*People ex rel. Van*

De Kamp v American Art Enterprises, supra, p 531). This conclusion rests, however, on an erroneous reading of *O'Brien*.

In *O'Brien (supra)*, defendant was arrested and convicted for burning his selective service registration certificate. On appeal, defendant argued that his action in burning his registration certificate constituted symbolic speech and that the Federal statutory provision prohibiting this activity impermissibly interfered with his First Amendment right of free speech. Thus, the test formulated by the court in *O'Brien* is applicable only where the Government seeks to regulate the nonexpressive element of conduct in a course of conduct which consists of both "speech" and "nonspeech" elements. Since the conduct at issue in *American Art Enterprises (supra)*, arranging prostitution, did not involve any element of speech, reliance on *O'Brien* was misplaced. Likewise, the conduct sought to be enjoined by the People in the instant case does not contain any element of speech and, hence, *O'Brien* is inapplicable.

Defendant's final argument in support of its contention that closure of the bookstore would impermissibly infringe on the First Amendment is that closure would be overbroad. "By definition an overbroad statute covers privileged activity, and to the extent that the statutory burden operates as a disincentive to action the result is an *in terrorem* effect on conduct within the protection of the first amendment. The reason for invalidating a substantially overbroad law is to end its deterrence of constitutionally preferred activity" (Note, The First Amendment Overbreadth Doctrine, 83 Harv L Rev 844, 853; see *Broadrick v Oklahoma*, 413 US 601, *supra; NAACP v Alabama*, 377 US 288). Since the conduct sought to be enjoined in this case is not "constitutionally preferred activity", the overbreadth doctrine is inapplicable.

Special Term's order denying partial summary judgment to the defendant should be affirmed.

GREEN, J. (concurring). I agree that plaintiff has stated a cause of action pursuant to article 23 of the Public Health Law and that defendant's motion for partial summary judgment was properly denied. I write separately, however, to express my concern that we are premature in reaching the constitutional issue relating to the statute's sanctions.

The order appealed from decided only defendant's motion for partial summary judgment. There has been no trial and no verdict from which defendant is aggrieved. Considerations of propriety, as well as long-established practice, demand that we not anticipate a question of constitutional law in advance of the necessity for deciding it, particularly where as here, there is another ground upon which this case may be disposed of (see *Ashwander v Valley Auth.*, 297 US 288, 341-348 [Brandeis, J., concurring opn]). If defendant should prevail at trial, there would be no constitutional issue. If plaintiff should prevail, defendant may move to cancel the order of abatement (Public Health Law, § 2332, subd 1; *People ex rel. Rudd v Rizzo*, 146 Misc 675).

Implicit in this court's prior affirmance of the trial court's denial of plaintiff's motion for a preliminary injunction (96 AD2d 751) was the notion that this case should proceed to trial like any other. We should say no more here.

DILLON, P.J., CALLAHAN and DOERR, JJ., concur with MOULE, J.; GREEN, J., concurs in a separate opinion.

Order affirmed, without costs.

APPENDIX E — ORDER OF ERIE COUNTY SUPREME COURT (FLAHERTY, J.), DATED JUNE 14, 1983

At a Special Term of the Supreme Court held in and for the County of Erie at Erie County Hall in the City of Buffalo, New York on the 10th day of November, 1982.

PRESENT: HON. THOMAS P. FLAHERTY, Justice Presiding [J.S.C.]

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,
Plaintiff

-vs-

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOKS AND NEWS,
CHARLES A. OTTAVIANO,
BLANCHE DUDLEY and
"all other persons unknown claiming
any ownership, right, title or
interest in the property affected
by this action"
Defendants

ORDER
Index No. H 18895

The Defendant, CLOUD BOOKS, INC. d/b/a VILLAGE BOOKS AND NEWS, having moved for partial summary judgment pursuant to CPLR 3212 against the Plaintiff, THE PEOPLE OF THE STATE OF NEW YORK ex rel. RICHARD J. ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY, and the Plaintiff having moved for a Protective Order pursuant to CPLR 3103 and the Defendant having cross-moved for an Order directing depositions pursuant to CPLR 3102(f),

NOW, on reading the Notice of Motion for Partial Summary Judgment dated November 1, 1982, the Affidavit of PAUL J. CAMBRIA, JR. dated November 2, 1982, in support of said Motion, and the Affidavit of ALBERT M. RANNI dated November 8, 1982 in opposition to said Motion, and

NOW, on reading the Notice of Motion for Protective Order dated October 26, 1982, and the Affidavit of LOUIS A. HAREMSKI sworn to on October 26, 1982 in support of said Motion, and the Notice of Cross-Motion dated November 3, 1982 seeking an Order directing depositions and the Affidavit of PAUL J. CAMBRIA, JR. dated November 3, 1982 in support of said Cross-Motion, and upon the Complaint, the Answer and other proceedings previously had herein and,

AFTER hearing ALBERT M. RANNI, Deputy District Attorney, and LOUIS A. HAREMSKI, Assistant District Attorney, on behalf of the Plaintiff, and PAUL J. CAMBRIA, JR., on behalf of the Defendant, CLOUD BOOKS, INC., and due deliberation having been had thereon, [and the Court having filed its Memorandum Decision]

[It is] ORDERED that Defendant's Motion for Partial Summary Judgment is in all respects denied, and it is further

ORDERED that Plaintiff's Motion for a Protective Order is in all respects granted, [without prejudice to defendant taking a deposition upon oral examination of a knowledgeable witness to be produced by the plaintiff and subsequently moving for further depositions upon a proper showing,]

[And it is further] ORDERED that Defendant's Cross-Motion for an Order directing depositions is in all respects denied, [except as herein otherwise indicated.]

[Signature]
Hon. Thomas P. Flaherty, J.S.C.

GRANTED: this [14th] day of June, 1983.
[Signature]
Court Clerk

APPENDIX F — MEMORANDUM DECISION OF ERIE COUNTY SUPREME COURT (FLAHERTY, J.), DATED MAY 31, 1983

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,
Plaintiff

-vs-

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOK AND NEWS STORE,
CHARLES A. OTTAVIANO, BLANCHE DUDLEY,
and "all other persons unknown claiming
any ownership, right, title or interest
in the property affected by this action",
Defendants

RICHARD J. ARCARA
DISTRICT ATTORNEY
(ALBERT M. RANNI,
Deputy District Attorney and
LOUIS A. HAREMSKI, Assistant
District Attorney, of Counsel)
Attorneys for Plaintiff

LIPSITZ, GREEN, FAHRINGER, ROLL,
SCHULLER & JAMES
(PAUL J. CAMBRIA, JR., Esq.,
of Counsel)
Attorneys for Defendant
Cloud Books, Inc.

MEMORANDUM

FLAHERTY, J.

The question on this motion for partial summary judgment is whether Title II of Public Health Law Article 23, entitled "Houses of Prostitution; Injunction and Abatement" can be employed to enjoin and abate a nuisance consisting of lewdness, assignation, or prostitution when it occurs at an establishment engaged in the sales of books, magazines, and the showing of movies. For the reasons stated below the court answers this question in the affirmative and denies Defendant's motion in all respects.

Defendant Cloud Books, Inc. (Cloud) operates the Village Book and News Store (Store) in Kenmore, New York. Defendant characterizes the Store as an adult bookstore, specializing in the sale of books and magazines of a sexually frank nature with the rear portion of the Store containing coin-operated mini-movie booths showing sexually explicit movies.

The District Attorney of Erie County commenced an equitable action in the State Supreme Court seeking to have a nuisance located at the Store permanently enjoined and abated. The complaint contains two separate causes of action; the first based upon the common law concept of a nuisance and the second upon the statutory definition of a nuisance set forth in §2320 of the Public Health Law. This motion concerns the second cause of action based on the Public Health Law.

The acts complained of and giving rise to the complaint involve allegations of a series of acts of prostitution, assignation, and lewdness observed by an undercover Erie County Deputy Sheriff at the Store over the course of some three weeks.

More specifically, the verified complaint alleges that the undercover Deputy Sheriff observed patrons masturbating on four different occasions; a female patron fondling a male patron; two males engaged in the act of fellatio; that while at the Store the undercover Deputy Sheriff was solicited for sexual conduct in return for a fee on at least four different occasions; and that Store employees were aware that acts of masturbation and offers of sexual conduct in return for a fee occurred on the premises but were unconcerned as long as the patrons involved were spending money on the Store's movie booths. Most of the acts allegedly observed by the undercover Deputy Sheriff occurred in or around the rear portion of the Store where the coin-operated movie booths were located which, according to the verified complaint, is separated from the front counter area by a swinging half door, but visible therefrom. By its answer, Defendant has denied both the commission of these acts and the knowledge that they occurred.

Public Health Law §2320 provides that whoever shall "erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance." If the existence of the nuisance is admitted or established the court is mandated to enter an order of abatement directing the removal from the subject premises of all furnishings used in conducting the nuisance and directing their sale and the effectual closing of the premises against its use for any purpose for a period of one year (Public Health Law §2329(1)). Such order of abatement may be cancelled upon payment by the owner of all costs of the proceeding and filing a bond in the full value of the property and on the condition that the owner will immediately abate the nuisance and prevent it from being established within a one year period (Public Health Law §2332(1)).

Prior to any judgment in an action commenced under Title II, the Plaintiff may obtain a temporary restraining order (Public Health Law §2323(1)) and a preliminary injunction (Public Health Law §2321(4)) enjoining the conduct complained of and restraining removal or interference with the furnishings used in connection therewith.

Plaintiff's request for a temporary restraining order in the case at bench was denied as were two separate applications for a preliminary injunction. In denying Plaintiff's first application for a preliminary injunction the Hon. John C. Broughton, J.S.C., found that Plaintiff's application fell significantly short of meeting the three pronged burden associated with any motion for temporary injunctive relief; likelihood of ultimate success on the merits, irreparable injury absent granting the injunction, and a balancing of the equities in favor of the applicant. By way of dicta, that court noted that Plaintiff had not pursued the legal remedy of criminal prosecution prior to seeking equitable relief or demonstrated that such a remedy was inadequate. Also by way of dicta that court raised a concern that under a Title II action an individual enjoined from conduct which is also prescribed by the Penal Law could eventually be imprisoned without constitutional and procedural safeguards traditionally associated with criminal prosecutions. Upon renewal of Plaintiff's application for a preliminary injunction Justice Broughton again denied temporary relief, this time on the basis that to grant the temporary injunctive relief sought would obviate the need for the ultimate remedy sought, that there was no proof that the acts complained of were still going on, that successful enforcement of a temporary injunction was unlikely, and that Plaintiff's likelihood of success on the merits of its second cause of action was questionable as Title II is directed toward the abatement and abolition of houses of prostitution.

On this motion Defendant seeks partial summary judgment pursuant to subdivision (e) of CPLR Rule 3212 dismissing, denying and severing those portions of the complaint which seeks to: permanently enjoin Cloud from lawfully conducting presumptively protected business activities; direct the Sheriff to remove, seize and sell all furniture, fixtures and personalty owed by Cloud; effectually close the Store and prohibit its use by Cloud for any purpose; direct the seizure of all materials at the Store and to obtain any relief pursuant to the Public Health Law.

Defendant contends that Title II is inapplicable as against the Store because it applies only to houses of prostitution, as that term is generally and commonly known. On a constitutional level, it is Defendant's position that if Plaintiff obtained the relief requested under Title II Defendant would be prevented from continuing to show movies or sell books and magazines which are presumptively protected due to allegations that acts and/or conduct other than the sale or exhibition of books, magazines, and movies occurred at the Store in the past. Defendant contends that the issuance of an injunction would constitute a total and final prior restraint upon presumptively protected activity and would restrain Defendant from continuing to disseminate materials clearly protected by the federal and state constitutions and thus reach far beyond the alleged activity asserted. Defendant further maintains that the presumptively protected activity which takes place at the Store would be impermissibly restrained by application of the sanctions provided by Title II since that title does not contain required procedural and constitutional safeguards.

Plaintiff responds that closure of the Store is sought not because of promotion of materials which might be obscene but to enjoin a nuisance consisting of prescribed sexual activity and solicitation. Plaintiff maintains that Title II applies to any building, erection or place used for purposes of lewdness, assignation, or prostitution and does not legitimize such activity solely be-

cause books, magazines or movies are also promoted thereat. Plaintiff asserts that the sanctions of injunction, confiscation of property, fine or imprisonment which might flow under Title II would be occasioned not by virtue of any constitutionally protected activity occurring at the Store but soley on the basis of activity not so protected. Plaintiff also maintains that summary relief is improper as questions of fact have been raised by joinder of issue herein and since the determination of constitutional issues of the magnitude asserted by Defendant is not proper on a motion for summary judgment.

Initially, the court declines to accept the limited view of the applicability of Title II as it relates to the character of the location in question (see *Commissioner of the Department of Buildings of the City of New York v. Sidne Enterprises, Inc.*, 98 Misc 2d, 386, 389). Although Title II carries the title of "Houses of Prostitution; Injunction and Abatement" and the title of each section of the article contains the prefix "Houses of Prostitution", the thrust of the article is broader as indicated by the explicit language of the first section (§2320) which provides as follows: "1. Whoever shall erect, establish, continue, maintain, use, own, or lease *any building, erection, or place used for the purpose of lewdness, assignation, or prostitution* is guilty of maintaining a nuisance. 2. The *building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued or exists*, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby *declared to be a nuisance* and *shall be enjoined and abated* as hereafter provided." (emphasis supplied) The language of this section does not describe a house of prostitution, as that term is generally and commonly known but includes any building, erection, or place used for the purpose of lewdness, assignation, or prostitution. The statute does not speak in terms of "primary use" for the purpose of lewdness, assignation, or prostitution, but merely

"use" for that purpose. While a title or heading may help clarify or point the meaning of an imprecise or dubious provision, it may not alter or limit the effect of unambiguous language in the body of the statute itself. The character of a statute is to be determined by its provisions, and not by its title (*Squadrito v. Griebsch*, 1 N.Y. 2d 471, 475).

The term house of prostitution comes within the definition of disorderly house (24 AmJur 2d, Disorderly Houses, §2) and notwithstanding the use of the term "house", it is not essential that a place be a house proper or a permanent abode in order to be a disorderly house, indeed it may be merely a room, part of a house, an apartment, a place of business, a boat, a bathhouse, a wagon, or a tent (*Ibid*, §4). Furthermore, a disorderly house need not be exclusively devoted to the kind of activities ordinarily branded as diorderly; it may be chiefly devoted to a legitimate purpose and yet be a disorderly house when illegal practices are engaged in under such circumstances as would by themselves make the place a disorderly house (*Ibid*, §5). Such is the nature of the proof which a Plaintiff must adequately demonstrate as part of his burden in succeeding in a Title II action when the primary purpose of a premises may not be for the purpose of lewdness, assignation, or prostitution.

The court agrees that Title II was not intended and should not be construed to apply to bookstores as bookstores. However, the provisions of Title II are applicable to bookstores which are "used for the purpose of lewdness, assignation, or prostitution" (Public Health Law §2320).

In upholding the application of a similar abatement statute[1] Michigan's Supreme Court held that numerous instances of accosting and soliciting for purposes of prostitution occurring at a bar would be sufficient to sustain finding that such place constituted a public nuisance subject to abatement under that state's statute (*State ex rel. Wayne Cty. Pros. Atty. v. Levenburg*, 406 Mich 476, 280 N.W.2d 810 (1979)).

The court does not adopt Defendant's view that this is a case involving impermissible prior restraint of presumptively protected materials or that the sanctions of Title II which are sought against the Store are overbroad in scope and lacking requisite procedural and substantive protections given the nature of the Defendant's First Amendment rights with respect to books, magazines and movies. The cases cited by Defendant (*Cosgrove v. Cloud Books, Inc.*, 83 AD2d 789; *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308) do not support the proposition that a nuisance consisting of lewdness, assignation, or prostitution cannot be enjoined or abated in the event the building involved also houses a bookstore. Rather, those cases, as well as numerous others cited by the Defendant, involving attempts to enjoin obscenity prior to a judicial determination, stand for the proposition that it is constitutionally impermissible to prohibit future conduct which might fall within the purview of the First Amendment.

In a case involving a massage parlor wherein it was alleged that prescribed sexual activity also occurred, the Arizona Supreme Court upheld the constitutionality of the state's abatement stat-

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[1] Michigan's Abatement Statute M.C.L. §600.3801; M.S.A. §27A.3801 provides in pertinent part: "Any building, . . . or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitution or other disorderly persons, . . . is hereby declared a nuisance and . . . shall be enjoined and abated as hereinafter provided, . . .".

ute[2] against the defendant's challenge that it worked an impermissible invasion of privacy rights and denied procedural and substantive due process (*State of Arizona v. B Bar Enterprises, Inc.*, 133 Ariz 99, 649 P.2d 978).

This is a case involving abatement of a nuisance not one involving prior restraint of presumptively protected materials and therefore, Defendant herein is not entitled to the full panoply of rights and safeguards afforded by *Freedman v. Maryland*, 380 US 51, and its progeny.

An establishment, whether it be of the highest calling or a market for the dissemination of materials of questionable moral value or legality, cannot employ the constitutional rights and protections, which it properly enjoys, as a curtain behind which illegal activity can be freely encouraged and conducted and beyond which legitimate law enforcement can perform its proper function in the enforcement of statutes entrusted to such agencies. The protections afforded by the laws and constitutions of the United States and the State of New York are designed to enhance the full exercise of the freedoms we enjoy and are not to be subverted as shields for illegal conduct.

The court makes no determination with respect to the sufficiency or character of the allegations contained in the complaint herein other than to state that enough has been alleged to warrant a trial. Whether or not the activites alleged are sufficient to bring the Store within the purview of Title II is a factual question which cannot be determined on this motion for partial summary judgment. It must be left to the trial court to determine whether the Store was "used for the purpose of lewdness, assignation, or

[2] Arizona's Bawdy House Abatement Statute, A.R.S. §12-802 declares that every building used as a place of prostitution, assignation, or lewdness is a nuisance which shall be abated by means of removal and safe of all fixtures used in aiding the nuisance and foreclosure of the building for one year.

prostitution" and therefore subject to the sanctions of Title II (see *People v. Morbel Realty Corp.*, 87 Misc 2d 989; *People ex rel. City of New York v. Macbeth Realty Co., Inc.*, 100 Misc 2d 926).

Also before the court are Plaintiff's motion for a protective order vacating Defendant's six notices to take depositions upon oral examination and Defendant's cross-motion for an order pursuant to CPLR §3102(f) directing the oral examinations of the individuals specified in its six notices.

Defendant has caused to be served upon Plaintiff notices to take depositions of the District Attorney, the Sheriff, the undercover Deputy Sheriff involved in this case, the Village of Kenmore Chief of Police, any and all Kenmore Village police officers involved in the investigation of the Store between September 1 and October 1, 1982, and any and all Deputy Sheriffs also so involved. The Plaintiff has stipulated its willingness to produce the undercover Deputy Sheriff whose observations formed the basis for the allegations in the complaint.

Under the facts and circumstances of this case, the other individuals noticed for depositions other than the District Attorney are agents or employees of the Plaintiff and as such are subject to examination upon notice and without the necessity of a court order (CPLR §3101 (a)(1)). However, as the Appellate Division, Second Department has recently restated, "The liberalization of discovery procedures (see CPLR 3101 *et seq.*) has not altered the general rule that, in the first instance, a corporation may designate which of its officers, directors or employees shall represent it for the purposes of pretrial depositions (see *Instructional Tel. Corp. v. National Broadcasting Co.*, 63 A.D. 2d 644, 404 N.Y.S. 2d 376; *Lonigro v. Baltimore & Ohio R.R. Co.*, 22 A.D. 2d 918, 255 N.Y.S. 2d 737). Where additional persons are sought to be deposed, the examining party must make a formal application to the court and must carry the burden of demonstrating that the

corporate representatives already deposed possessed insufficient knowledge or were otherwise inadequate (see *Besen v. C.P.L. Yacht Sales*, 34 A.D. 2d 789, 312 N.Y.S. 2d 144)." (*Rosner v. Maimonides Hospital*, 89 A.D. 2d 847, 848) This principle, applied generally to corporations, is equally applicable to the state (*National Reporting Inc. v. State of New York*, 46 A.D. 2d 576, 578).

In the absence of proof that the District Attorney possesses detailed personal knowledge of the facts in issue, he should be accorded the normal right, in the first instance, to designate his witness (*National Reporting Inc.*, supra; *Long Island College Hospital v. Whalen*, 55 AD 2d 792).

Accordingly, Plaintiff's motion for a protective order vacating the six Notices is in all respects granted and Defendant's cross-motion for an order granting depositions is in all respects denied without prejudice to Defendant taking a deposition upon oral examination of a knowledgeable witness to be produced by the Plaintiff and subsequently moving, if necessary, for the deposition of additional persons upon a proper showing, if so advised.

In sum, Defendant's motion for partial summary judgment is in all respects denied; Plaintiff's motion for a protective order is in all respects granted; and Defendant's cross-motion for an order directing depositions is in all respects denied.

[Signature]

THOMAS P. FLAHERTY
J.S.C.

DATED: May 31, 1983
Buffalo, New York.

APPENDIX G — SUMMONS DATED OCTOBER 1, 1982

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY
25 Delaware Avenue
Buffalo, New York 14202
Plaintiff

-vs-

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOKS AND NEWS,
3102 Delaware Avenue
Kenmore, New York 14217
and
CHARLES A. OTTAVIANO,
5119 Shimerville Road
Clarence, New York 14031
and
BLANCHE DUDLEY
123 Fleetwood Terrace
Williamsville, New York 14221
and
"all other persons unknown claiming
any ownership, right, title or
interest in the property affected
by this action"
Defendants

SUMMONS
Index No. H18895

To the above named Defendants:

YOU ARE HEREBY SUMMONED AND REQUIRED to serve upon the Plaintiff's attorney, at the address stated below, a

written Answer to the attached Complaint.

If this Summons is served upon you within the State of New York by personal service you must respond within TWENTY (20) days after service, not counting the day of service. If this Summons is not personally delivered to you within the State of New York you must respond within THIRTY (30) days after service is completed, as provided by law.

If you do not respond to the attached Complaint within the applicable time limitation stated above a Judgment will be entered against you, by default, for the relief demanded in the Complaint, without further notice to you.

This action is brought in the County of Erie because of Plaintiff's and Defendants' residence.

DATED: October 1, 1982

RICHARD J. ARCARA
DISTRICT ATTORNEY OF ERIE COUNTY
25 Delaware Avenue
Buffalo, New York 14202
(716) 855-2424

APPENDIX H — VERIFIED COMPLAINT DATED OCTOBER 1, 1982

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,
Plaintiff

-vs-

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOKS AND NEWS,
CHARLES A. OTTAVIANO,
BLANCHE DUDLEY and
"all other persons unknown claiming
any ownership, right, title or
interest in the property affected
by this action"
Defendants

COMPLAINT
Index No.

Plaintiff, RICHARD J. ARCARA, District Attorney for the County of Erie, for his Complaint against the above-captioned defendants seeking permanent injunctive relief, staes and alleges as follows:

1. RICHARD J. ARCARA is District Attorney for the County of Erie, State of New York, with offices at 25 Delaware Avenue, Buffalo, New York, telephone number (716) 855-2424 and brings this action in his capacity as said District Attorney.

2. Defendant CLOUD BOOKS, INC. is a corporation existing under and by virtue of The Business Corporation Law of the State of New York with its stated office for service of process by

the Secretary of State at 3102 Bailey Avenue, Buffalo, New York 14215.

3. Defendant CLOUD BOOKS, INC. was formed for the purposes of the printing, sale and publication of books, magazines and periodicals and to deal in and with coin-operated vending machines, devices, novelties and sundries of every kind and description.

4. Defendant CLOUD BOOKS, INC. conducts its business under an assumed name, to wit: VILLAGE BOOKS AND NEWS, and out of a premises located at 3102 Delaware Avenue, Kenmore, New York 14217.

5. That the following allegations in this Complaint, unless otherwise stated, are made upon information and belief, the source of which is the results of surveillance and investigative efforts by the Erie County District Attorney's Office and the Erie County Sheriff's Department.

6. That RANDY REAVES is an employee and the day manager of the defendant, CLOUD BOOKS, INC.: that NICHOLAS LUCKI is an employee and the night manager of the defendant CLOUD BOOKS, INC.; that LENNY PERL is their immediate supervisor, and is employed as district manager for the defendant, CLOUD BOOKS, INC., as well as other similar type stores located within the Western New York State area and that RAY STUBBS is an employee of the defendant, CLOUD BOOKS, INC., and services the coin operated "peep show" movies and booths.

7. Defendant CHARLES A. OTTAVIANO is the owner of the premises which encompasses the address 3102 Delaware Avenue, Kenmore, New York, the business address of defendant, CLOUD BOOKS, INC., d/b/a VILLAGE BOOKS AND NEWS. Said ownership is evidenced by a deed to CHARLES A. OTTAVIANO dated September 21, 1971 and recorded in the Erie County Clerk's Office on September 21, 1971 in Liber 7841 of Deeds at page 69. A copy of said deed is attached as Exhibit A.

8. Defendant BLANCHE DUDLEY is the mortgagee under a certain mortgage executed by Charles A. Ottaviano to Blanche Dudley and Edith Tolsma dated September 21, 1971 and filed in the Erie County Clerk's Office on September 21, 1971 in Liber 7196 of Mortgages at page 557. Said mortgage was subsequently assigned by Edith Tolsma to Blanche Dudley by an assignment of mortgage dated November 1, 1973 and filed in the Erie County Clerk's Office on November 13, 1973 in Liber 7478 of mortgages at page 341. Copies of each are attached as Exhibits B and C.

9. An undercover Deputy Sheriff assigned to an investigation relating to activities occurring at the aforesaid premises and building related the following incidents:

A. On September 13th, 1982, at approximately 4:00 p.m., as other patrons were present within the subject premises, a white male in his twenties was observed masturbating while standing in the doorway of one of the coin-operated motion picture booths located within the aforesaid premises.

B. On September 15th, 1982, at approximately 2:35 p.m., again while other patrons were present, a different white male was observed masturbating while being seated in one of the coin operated motion picture booths located within the aforesaid premises.

C. On September 15th, 1982, at approximately 3:00 p.m., a young girl, estimated to be sixteen years of age, entered the aforesaid premises to return a mechanical sexual device in the form of a penis, commonly known as a "vibrator" which, according to her statement to the manager, did not work. In response, the manager stated that he was unable to return her money but that he would exchange the "vibrator" with another, which in fact occurred.

D. That, approximately 3:30 p.m., the undercover Deputy Sheriff was approached by a white male, approximately 40 years old, who handed him a piece of paper on which was written "call

Jeff" and a telephone number. That on September 16th, 1982, the undercover Deputy Sheriff called the number and an individual who identified himself as Jeff offered to commit an act of oral sex in return for twenty dollars.

E. That, on September 16th, 1982, at approximately 3:30 p.m., at the aforesaid premises, an individual known to the undercover Deputy Sheriff as LEONARD PERL, identified himself as the manager of the premises in question as well as other similar stores in the Western New York area and offered employment to the undercover Deputy Sheriff. In response to the undercover Deputy Sheriff's stated concerns relative to the acts of masturbation occurring within said premises, Leonard Perl stated:

> "I don't care if they suck, fuck, play with themselves, do drugs, as long as they put quarters in the machines."

Leonard Perl also stated:

> "I told you, I'm not going to let a whore come into here and fuck without putting quarters in the machine or let a guy get blown for free."

Subsequent thereto, the undercover Deputy Sheriff had a conversation with Randy Reaves regarding the various activities at the store. Randy Reaves confirmed to the undercover Deputy Sheriff the above statements of Lenny Perl and in addition, told him not to worry, that he's been arrested, that they've taken good care of him now, that they paid all his legal fees, that nothing ever happened to him and that all the charges were always dropped. In addition, he stated that:

> "it didn't matter what they did in the back, not to pay attention to it and if anything happened in the front of the store, to call the Kenmore Police and that they would take care of matters in the front, as far as a disturbance or anything like that."

F. Thereafter, another white male was observed masturbating in the area of the coin operated projection booths as several teenage children were present in the premises and at or about the same time a young girl, estimated to be a teenager, purchased a rubber penis from Randy Reaves.

G. On September 17th, 1982, at approximately 4:00 p.m., in the parking lot of the aforesaid premises, the undercover Deputy Sheriff had a conversation with an individual who identified himself as one RAY STUBBS concerning the sale of five "hard core" pornographic films for the price of $100.00.

H. Between September 17th, 1982 and September 20th, 1982, both RANDY REAVES and NICK LUCKI stated to the undercover Deputy Sheriff that they were aware of the acts of masturbation being committed on the premises; that these acts occurred all the time; and that the undercover Deputy Sheriff shouldn't pay any attention to them.

I. On September 20th, 1982, a white male was observed masturbating in the projection booth area of the premises as a younger white male estimated to be a teenager was present.

J. After the teenager exited the premises, a white male estimated to be in his late 30's who had been previously looking at the peep shows approached the undercover Deputy Sheriff and offered to perform an act of oral sodomy upon the deputy in return for the sum of ten dollars. After the undercover Deputy Sheriff did not respond to the offer, said male then approached yet another patron within the aforesaid premises. These two were then observed leaving the premises together.

K. Shortly thereafter, two white males were observed within the aforesaid premises standing behind the row of projection booths, engaged in an act of fellatio.

L. On September 25, 1982, the undercover Deputy Sheriff telephoned the aforesaid premises and had conversations with Nick Lucki during which Lucki agreed to share with the undercover Deputy Sheriff an ounce of marijuana. Lucki, however, failed to do so, claiming that his source for the controlled substance had not shown up.

M. On the evening of September 28, 1982, a white male in his early twenties approached the undercover Deputy Sheriff as

he was about to enter aforesaid premises and offered him to perform an act of oral sex in return for the sum of five dollars. The undercover Deputy Sheriff did not respond to the solicitation and entered the aforesaid premises. The same white male followed undercover Deputy Sheriff into the premises and restated the offer. The undercover Deputy Sheriff replied that he was not interested. Then the same white male asked if the undercover Deputy Sheriff knew of any truck drivers or any other guys he could "blow for five dollars" and that he would "do as many" as he "could get."

N. Shortly thereafter, this offer was brought to the attention of Nick Lucki who laughed and responded:

> "It happens all the time. Don't worry about it. Don't pay any attention to it."

O. That on September 27, 1982, in the aforesaid premises, Nick Lucki sold a solution identified as "Crypt Tonite" to the undercover Desputy Sheriff. Lucki told him "sniff it, you'll go crazy! It'll fuck up your head. It won't be available pretty soon. It'll be illegal soon. Let me open it up. Go in the back. Whatever you do, don't do it when you're driving. See that guy. I just sold him some." Observed then was a middle age white male walking from one of the projection booths in the aforesaid premises. Said white male was staggering as he walked and his eyes were glazed. In the opinion of the undercover Deputy Sheriff, said white male appeared drunk.

P. On September 30, 1982 at approximately 10:30 p.m., the undercover Deputy Sheriff was at the aforesaid premises and observed a short male in his late thirties with a dark beard. After the Deputy Sheriff inquired as to which movie was the best, the male pointed to one and said "Why don't you come in here, I'll blow you." The Deputy asked "What?" to which the male stated "Come on in here, I'll blow you." The Deputy responded "No."

Q. On October 1, 1982, at approximately 12:20 a.m., the Deputy Sheriff again entered the premises and proceeded to the

area of the booths where he was approached by a male who asked, "Do you want to get blowed?" In response to the Deputy's question "What?" the individual reiterated his question "Do you want to get blowed?" The following colloquy then occurred. "What is it going to cost me?" "Ten dollars." "Where?" "In here." "No."

R. Thereafter, the Deputy Sheriff observed a white male in his late twenties and a young female enter the premises and proceed to the area of the projection booths, the female was observed fondling the male while the door to the booth was open.

10. That the aforementioned conduct constitutes the commission of the crimes of prostitution as defined in Article 230 of the Penal Law, Sale of Controlled Substances as defined in Article 221 of the Penal Law and Public Lewdness as defined in Article 245 of the Penal Law. Normal criminal penalties are ineffective and inadequate in preventing or punishing the activities described above and do not afford the requisite protection to health and safety of the public.

11. That in addition to the literature and items of an explicitly sexual nature which are sold at defendant's premises, there exists a window display, clearly visible from the sidewalk which presents material of both sexual and non-sexual content. Some of the publications presented in the window include magazines such as "Gentlemen's Quarterly", "High Fidelity", "Pro Football" and "Metropolitan Home" and various publications geared for a younger audience such as "Mad Magazine", "Video Games" and are presented to induce the patronage of younger individuals.

12. That inspite of notices expressing a 21 year age limit to enter the premises, the managers at said premises have totally failed to enforce that age limit and numerous individuals believed to be in their mid-teens have been seen frequenting the premises and making purchases therein.

13. That the premises itself includes a front customer area and a second room which includes a general display area and booths for coin operated movies. Said back room is separated from the front counter area only by a swinging half door.

14. Activities such as those described earlier in Paragraph No. 9 may be visible from the front area of the premises. That the acts of Public lewdness, masturbation, prostitution, fellatio, and sale of controlled substances are being conducted and permitted with the knowledge and consent of the defendant CLOUD BOOKS, INC., constitutes conduct or omissions which offend, interfere with or cause damage to the public in the exercise of right common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the health, safety or comfort of a considerable number of persons.

15. Plaintiff has no adequate remedy at law.

16. No prior application has been made for the relief requested herein.

AS AND FOR A SECOND CAUSE
OF ACTION

17. Plaintiff reasserts and realleges that allegations contained in Paragraphs One through Sixteen as if set forth fully herein.

18. Plaintiff Richard J. Arcara, as District Attorney of Erie County, brings this action pursuant to and by the authority of Public Health Law §2321 of the State of New York.

19. That the common fame and general reputation of the aforesaid premises and building is that it is a place kept, conducted, and maintained for the purpose of lewdness, assignation and prostitution and the common fame and general reputation of the occupants thereof and frequenters thereto is that of individuals engaged in criminal conduct.

20. Unless said defendants and each of them is restrained by the order of this Court, they and each of them will continue to

use, occupy and maintain said building and premises, together with the furniture, fixtures and personal property contained therein for the purposes herein complained of, and that they and each of them will continue to allow, permit and encourage the maintenance and continuance of said nuisance on said premises. to the irreparable damage to the People of the State of New York, and in violation of the laws of said State.

WHEREFORE, under each cause of action, plaintiff demands judgment as follows:

1. That the defendant, Charles A. Ottaviano, as owner of said premises, and Blanche Dudley, as mortgagee of said premises have failed to abate the same, and that they be permanently enjoined from conducting, maintaining, using, occupying, or in any way permitting the use of said ground, building, or premises, for the purposes of lewdness, assignation and prostitution.

2. A declaration that the defendant Cloud Books, Inc., doing business as Village Books and News, has been maintaining, using and occupying said premises for the purpose of lewdness, assignation and prostituion, and have been maintaining a nuisance thereon and therein and that they permanently restrained from the continuance of said nuisance and of said unlawful acts in or upon said premises or in or upon any other premises in the State of New York.

3. That the defendant Cloud Books, Inc. doing business as Village Books and News is the owner of the aforementioned furniture, fixtures and personal property located in and upon said premises and that they have been using and maintaining the same for the purposes of the nuisance complained of herein and that it be permanently enjoined from further using the same for the purposes of said nuisance in or upon said premises or at any place in the State of New York.

4. That the ground, building and premises herein described be permanently and perpetually enjoined as a place in or upon

which to conduct or maintain or continue the nuisance herein complained of, by said defendants or by any other person or corporation whatsoever.

5. That the Court forthwith issue an ex parte order restraining the defendant Cloud Books, Ind. d/b/a Village Books and News and all other persons until the further order of this Court from conducting, maintaining, using or occupying or in any way permitting the use or occupancy of said premises and the building located thereon for the purpose of lewdness, assignation or prostitution and from continuing or maintaining the premises as a nuisance or the situs of any unlawful acts and from removing or damaging the furniture, fixtures and personal property used in conducting such nuisance as herein described, regardless of who the owner may be or whether the owner had notice of this action, and in said order fix the time of hearing for an order continuing said injunction during the pendency of this action, all pursuant to Section 2321 of the Public Health Law.

6. That upon the final judgment herein and as a part thereof an order shall be made and entered abating the said nuisance, which said order shall direct the Sheriff of Erie County to remove from the building and property herein described all furniture, fixtures, and personal property of whatever kind or nature used in conducting or maintaining said nuisance and directing the Sheriff to sell the same in the manner provided for the sale of chattels under execution and shall direct said Sheriff to effectually close the building or place, prohibiting its use for any purpose and to keep the same closed as provided by law.

7. A temporary injunction issue without bond against the defendants and each of them restraining them and each of them from in any way or manner personally or through any agent, servant, tenant, representative or employee, directly or indirectly, or in any manner whatever from erecting, establishing, continuing, using, owning or permitting the said building to further use for the purpose of lewdness, assignation or prostitution and

from continuing or maintaining the premises as a nuisance or the situs of any unlawful acts.

8. The costs of this action be taxed against the defendants and that execution issue therefore together with such other and further relief as to the Court may seem just and proper.

DATED: Buffalo, New York
October 1, 1982

Yours, etc.

RICHARD J. ARCARA
District Attorney
Erie County
25 Delaware Avenue
200 Erie County Hall
Buffalo, New York 14202

APPENDIX I — VERIFIED ANSWER OF CLOUD BOOKS DATED OCTOBER 18, 1982

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD J. ARCARA, District
Attorney of Erie County,
Plaintiff,

vs.

CLOUD BOOKS, INC. d/b/a VILLAGE BOOK AND NEWS STORE, CHARLES A. OTTAVIANO, BLANCHE DUDLEY, and "all other persons unknown claiming any ownership, right, title or interest in the property affected by this action",
Defendants.

VERIFIED ANSWER
Index No. H-18895

The Defendant, CLOUD BOOKS, INC. d/b/a VILLAGE BOOK AND NEWS STORE, by and through their attorneys, Lipsitz, Green, Fahringer, Roll, Schuller & James, Paul J. Cambria, Jr., for their Verified Answer, upon information and belief, allege the following:

1. The Defendant Cloud Books, Inc. admits the allegations contained in paragraphs 1, 2, 3, 4, and 7 of the Verified Complaint.

2. The Defendant Cloud Books, Inc. denies the allegations contained in paragrphs 9(E), 9(H), 9(L), 10, 15, 17, 19, and 20 of the Verified Complaint.

3. Denies the allegations contained in paragraph 12 which allege or imply that individuals under the age of 21 are permitted to frequent the premises of the Village Book and News Store and

further make purchases thereon. Rather, it is hereby stated that it is firm corporate policy that no persons under the age 21 are allowed or permitted to frequent the premises nor are persons under the age of 21 allowed or permitted to make purchases therein. In fact, it has been made perfectly clear to all employees of Cloud Books, Inc. that under no circumstances are materials of a sexually frank nature to be sold to persons who, in fact, are under the age of 21 and said employees are further informed that any violations of this corporate policy would result in their immediate termination.

4. The Defendant Cloud Books, Inc. further submits based upon information and belief, the source of said information and grounds for said belief being conversations had with various employees of the Village Book and News Stor, that the 21 year age limit is strictly enforced.

5. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 5, 8, 9(G), 9(K), 9(R), 16 and 18 of the Verified Complaint.

6. Admits the portions of paragraph 6 which allege that Randy Reaves and Nicholas Lucki are employed by Cloud Books, Inc., except as to those portions which imply or infer that Randy Reaves and/or Nicholas Lucki occupy a managerial position. Rather, it is submitted that Randy Reaves and Nicholas Lucki do not hold any supervisory or managerial position of any nature regarding the Village Book and News Store, but are merely employed as clerks.

7. Denies those portions of paragraph 6 which imply or infer that Lenny Perl and Ray Stubbs are employees of Cloud Books, Inc. It is hereby stated that neither Lenny Perl nor Ray Stubbs are employed by Cloud Books, Inc.

8. Denies the allegations contained in paragraphs 9, 9(A) and 9(B) which infer or imply that activities of an auto-erotic nature

are allowed or permitted to occur by Cloud Books, Inc., its agents or employees. Rather, it is submitted based upon information and belief, the source of said information and grounds for said belief being conversations had with various employees of Cloud Books, Inc., that no such activity occurred on the premises, or if they occurred, they merely constituted acts of indiscretion by patrons and were done without the knowledge, either explicit or implied, of any employees or agents of the defendant Cloud Books, Inc. It is further stated that it is firm corporate policy, which is made clearly known to all employees, that if such activity occurs on the premises of the Village Book and News Store, that the patrons are immediately asked to leave and are not allowed to frequent the premises. This corporate policy is strictly enforced and the employees are further informed that any deviation from the policy, or their failure to enforce the same strictly, would lead to the immediate termination of employment.

9. Denies the allegations contained in paragraph 9(C) which allege or imply that a young girl approximately 16 years of age was allowed to exchange a "vibrator." Rather, it is hereby stated that under no circumstances are persons under the age of 21 allowed to purchase said mechanical devices and, in fact, it is strict corporate policy not to sell or otherwise engage in any transactions regarding said devices with persons who are under the age of 21. Furthermore, it is hereby stated that the employees of Cloud Books, Inc. are specifically informed of this policy and are further informed that any violation or deviation from the policy will result in their immediate termination of employment.

10. Denies the allegations contained in paragraphs 9(D), 9(J), 9(P), and 9(Q) which infer or imply that acts of solicitation for purposes of prostitution occur or are allowed to occur on the premises of the Village Book and News Store. Rather, based upon information and belief, the source of said information and grounds for said belief being conversations had with the various employees of Cloud Books, Inc., it is hereby stated that no such activities of solicitation are allowed to occur or are otherwise

condoned by any employees, agents, etc. of Cloud Books, Inc. Rather, all employees of Cloud Books, Inc. are informed that if any said activity occurs on the premises of the Village Book and News Store, that they are to request the patron involved to immediately leave the premises and further bar them from re-entry. Furthermore, all employees of Cloud Books, Inc. are informed that any deviation from this corporate policy would lead to immediate termination of employment.

11. Denies the allegations contained in paragraphs 9(F) and 9(I) which infer or imply that activity of an auto-erotic nature by patrons occurred in the motion picture booths while teenagers were present. Specifically, it is hereby stated that at no time are people or persons under the age of 21 allowed in the back of the store where said motion picture booths are located and, in fact, numerous signs indicating this fact are prominently displayed on the premises. It is further stated that this policy is made known to all employees of Cloud Books, Inc. and is strictly enforced and further, that all employees of Cloud Books, Inc. are informed that any deviation from strict enforcement of this policy would lead to the immediate termination of employment.

12. Denies the allegations contained in paragraphs 9(M) and 9(N) which infer or imply that an unknown undercover Deputy Sheriff, who was known to employees of the Village Book and News Store as "Gino", and who is believed to be Joseph Pettronella, had informed any employee of the Village Book and News Store that he had been solicited regarding payment of a fee for oral sexual activity by any patron of the book store. Moreover, the defendant corporation denies those allegations contained in paragraph 9(N) regarding conversations allegedly had between the person known as "Gino" and Nicholas Lucki and it is hereby stated that said conversations are taken completely and totally out of context.

13. Admits the allegations contained in paragraph 9(O) except as to those portions which infer or imply that a patron of the Vil-

lage Book and News Store who had purchased the substance "crypt tonite" had inhaled or otherwise imbibed in the substance while on the premises of the Village Book and News Store. Rather, it is hereby asserted that the individual referred to in this portion of the Complaint appeared at the premises of the Village Book and News Store in a dazed condition prior to purchasing this substance.

14. Admits the allegation contained in paragraph 11 except as to those portions thereof which infer or imply that materials contained in the window display of the Village Book and News Store present materials of a sexual content. Rather, it is hereby stated that none of the publications presented in the window are of a sexually frank character and it is further stated that these materials are not presented to induce patronage of persons under the age of 21.

15. Denies the allegations contained in paragraphs 13 and 14 which infer or imply that activities occurring in the rear portion of the book store are readily visible from the front area of the premises. Rather, it is hereby stated that the Village Book and News Store is constructed in such a manner that any and all materials, activities, etc in the rear portion of the store are not readily visible from the front portions of the store which are accessible to members of the general public.

16. The Defendant Cloud Books, Inc. further specifically denies those portions of paragraph 14 which infer or imply that acts of lewdness, masturbation, prostitution, fellatio and sale of controlled substances are being conducted and permitted to be conducted on the premises of the Village Book and News Store with the knowledge and consent of the Defendant Cloud Books, Inc. Rather, it is hereby stated, that not only do such activities not occur but, if they do occur, they merely represent random activities by patrons of the book store which are in no manner condoned or allowed to occur by any employee, agent, etc. of the Defendant Cloud Books, Inc.

17. The Defendant Cloud Books, Inc. further denies any and all allegations contained in the Verified Complaint which are not specifically admitted, denied or otherwise controverted.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:

18. That the relief prayed for in the Verified Complaint violated the Defendant Cloud Books' rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution, especially in regard to those portions of the Verified Complaint which request the complete closure of the premises and, thus, would prohibit the Defendant from engaging in presumptively protected business activity at the Village Book and News Store.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:

19. That the provisions of the Public Health Law § 2320 *et seq.*, as applied to the Defendant Cloud Books, Inc., are unconstitutional on their face and as applied in that they violate the provisions of the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:

20. That the provisions of Public Health Law § 2320 *et seq.*, as applied to the Defendant, are overbroad, vague and underinclusive and further violate the Defendant Cloud Books, Inc.'s rights under the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:

21. That the provisions of the Public Health Law § 2320 *et seq.*, as applied to the Defendant, Cloud Books, Inc., violates the Defendant Cloud Books, Inc.'s rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution as well as the corresponding provisions of the New York State Constitution.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE, THE DEFENDANT ALLEGES:

22. That the provisions of the Public Health Law § 2320 *et seq.*, as applied to the Defendant Cloud Books, Inc., results in the taking of its property without just compensation as guaranteed by the process clause of the Fourteenth Amendment to the United States Constitution as well as the corresponding provisions of the New York State Constitution.

23. The Defendant Cloud Books, Inc. further demands that it be given a jury trial as to all issues in the present matter.

WHEREFORE, the Defendant Cloud Books, Inc. demands judgment against the Plaintiff dismissing the Complaint herein, together with costs and disbursements, and additionally requests such other, further and different relief as may be just and proper under the circumstances.

Dated: Buffalo, New York
October 18, 1982

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.
Attorneys for Defendant
Cloud Books, Inc.
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

TO:

RICHARD J. ARCARA, ESQ.
Erie County District Attorney
200 Erie County Hall
25 Delaware Avenue
Buffalo, New York 14202

APPENDIX J —
VERIFIED ANSWER OF OTTAVIANO
DATED OCTOBER 12, 1982

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,
Plaintiff

v.

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOKS & NEWS,
CHARLES A. OTTAVIANO
BLANCE DUDLEY and
"all other persons unknown claiming
any ownership, right title or
interest in the property affected
by this action"
Defendants

ANSWER OF DEFENDANT
CHARLES A. OTTAVIANO

INDEX NO. H-18895

Defendant, Charles A. Ottaviano, by Frank G. Gunderman, his attorney, for his answer to the complaint herein alleges:

1. Admits the allegations contained in paragraphs 1 and 8.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3, 4, 5, 6, 9A through 9R inclusive, 11, 12 and 13.

3. Denies the allegations contained in paragraphs of the complaint numbered 10, 14, 15, 19 and 20.

4. As to allegations contained in paragraph 7 of the complaint, admits that he is the owner of premises No. 3102 Dela-

ware Avenue, Kenmore, New York, and denies each and every allegation contained in said paragraph.

5. Denies each and every allegation in said complaint contained not hereinbefore admitted, denied or controverted.

WHEREFORE, defendant Charles A. Ottaviano demands judgment dismissing the complaint herein together with the costs and disbursements of this action.

FRANK G. GUNDERMAN
Attorney for Defendant
Charles A. Ottaviano
Office & P.O. Address
921 Niagara Frontier Building
Buffalo, New York 14202
852-2036

TO: RICHARD J. ARCARA
District Attorney of Erie County
25 Delaware Avenue
Buffalo, New York 14202
855-2424

TO: LIPSITZ, GREEN, FAHRINGER, ROLL,
SCHULLER & JAMES
Attorney for Defendant
Cloud Books, Inc. d/b/a
Village Books & News
One Niagara Square
Buffalo, New York 14202
848-1333

TO: FALK & SIEMER
Attorneys for Defendant
Blanche Dudley
1900 Main Place Tower
Buffalo, New York 14202
852-6670

OPPOSITION

BRIEF

No. 85-437

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,

Petitioner,

vs.

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOK AND NEWS STORE,
CHARLES A. OTTAVIANO, BLANCHE DUDLEY
and all other persons unknown
claiming any ownership, right,
title or interest in the property
affected by this action,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL JOHN CAMBRIA, JR., ESQ.
Attorneys for Respondents
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Buffalo, New York 14202
(716) 849-1333

MARY GOOD, ESQ. of Counsel

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

STATUTES

STATEMENT PURSUANT TO SUPREME COURT RULE 28(.1)

Respondent, CLOUD BOOKS, INC. d/b/a VILLAGE BOOK AND NEWS STORE, does not have any parent companies, subsidiaries or affiliates.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE PEOPLE OF THE STATE OF NEW YORK ex rel. RICHARD J. ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY,

Petitioner,

vs.

CLOUD BOOKS, INC. d/b/a VILLAGE BOOK AND NEWS STORE, CHARLES A. OTTAVIANO, BLANCHE DUDLEY, and all other persons unknown claiming any ownership, right, title or interest in the property affected by this action,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THIS CASE IS NOT APPROPRIATE FOR REVIEW SINCE NO SIGNIFICANT QUESTION OF LAW IS RAISED OR SERIOUS CONFLICT AMONG THE COURTS IMPLICATED.

Far from signifying any radical departure from constitutional law, as

Petitioner implies, the decision below is based upon settled First Amendment principles applied to a bookstore selling materials that, while sexually explicit, are not obscene. The order of the Court of Appeals was predicated on its holding that the incidental effect on First Amendment freedoms wrought by the mandatory one-year closure of the bookstore was not justified since the concededly important interests at stake might be served equally well by less drastic measures; i.e., the least drastic remedy needed to abate the alleged nuisance. Because the District Attorney, prior to seeking closure, did not attempt less restrictive relief, nor the injunction available through Article 23, Title II of the Public Health Law, the Court held that closure, regardless of

the sexual activity alleged, could not be permitted.

The holding relied, in part, upon United States v. O'Brien, 391 U.S. 367 and subsequent applications of that case by this Court. Petitioner, however, argues that O'Brien is pertinent only where "the Government seeks to regulate the non-speech aspect of conduct comprised of both speech and non-speech elements" (p. 11 of Petition). Eschewing the holding below, Petitioner asks this Court to rule in conformity with its own analysis which maintains that "[b]ecause the essence of prior restraint is Government control over the message, ideas, subject matter or content of First Amendment materials . . . the absence of content censorship in the present case makes clear the absence of

prior restraint" (p. 8 of Petition).

To Respondent's knowledge, this Court has never limited the notion of prior restraint to that which occurs when content control is effectuated. Instead, its cases are replete with reference to indirect forms of censorship which have been found as reprehensible and thus as much a prior restraint as explicit content control. See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co., ___ U.S. ___, 104 S.Ct. 2839, 2851 n.12; Healy v. James, 408 U.S. 169, 183; Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 552, 556, n.8; While direct desire to control the message may represent the essential prior restraint, the test articulated in United States v. O'Brien, supra, has regularly been employed in

later cases teaching that indirect encroachment upon the First Amendment must also be stringently curtailed wherever possible. The Court of Appeals said:

> "Prior restraints or other restrictions on First Amendment rights may be present not only where a statute directly prohibits expression but also where the impact of the statute curtails the exercise of these rights" (A-16).

In so concluding, the Court relied upon cases such as Healy v. James, supra, where a college dean had denied a student political group the right to use campus facilities. The Court responded that, no matter the legitimacy of the motivation, the effect of the college's action was a form of prior restraint, which was justified only if the college bore the "heavy bur-

den" of demonstrating its appropriateness (Id. at 184).

Thus, even in the case where the governmental authority did not seek to control the content of the speech, this Court has held that the concept of prior restraint is implicated and that the balancing test authorized in O'Brien, supra, is rightly employed. The point was made explicit in Procunier v. Martinez, 416 U.S. 396 where the state of California justified its censorship of prison mail on security grounds. While recognizing the security aspect of prison life, this Court adopted the balancing test of O'Brien, supra, and Healy, supra. Although cognizant that those cases were not directly controlling the Court reminded the litigants that:

> "In broader terms, however, these precedents involved incidental restrictions on First Amendment liberties by governmental action in furtherance of legitimate and substantial state interest other than suppression of expression" (Id. at 411-412).

Apparently, it is only by ignoring these holdings that Petitioner feels it can argue first, that no prior restraint exists where the Government does not seek to control content and secondly, that a test balancing often competing interests is apropos only where speech and non-speech elements are combined in a course of conduct with the Government seeking to regulate the latter. This constrained approach is simply incorrect and does not necessitate Supreme Court review.

Even assuming arguendo the O'Brien test to be properly applied to

this situation, Petitioner states that the Court below gave too great a deference to the incidental effect that closure of the bookstore would have upon the First Amendment. The District Attorney attempts to appease those who would retain a vigilant First Amendment watch: the bookstore can relocate, no one would complain if the property were subject to a tax foreclosure sale or its owner jailed for theft. Such comparisons are pointless and without logic. As noted by the Court of Appeals, the feasibility of relocation is not only speculative but also, is an inadequate answer to the demands of the Constitution which does not condone the abridgment of free speech in an appropriate setting merely because an alternative locus is available (A-16). See South-

eastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 456, Young v. American Mini Theatres, 427 U.S. 50, 71 n.35.

Fur'ner, that an establishment razed bec.use of tax foreclosure or criminal mismanagement will of necessity lose its constitutional protection does not dilute the reasoning of the Court of Appeals. It used a balancing test; it did not rule that sexual misconduct can never result in closure. Just as a recalcitrant owner who refuses to pay his taxes will have to face foreclosure, so, too, the owner who ignores an injunction and a criminal contempt sanction for permitting sexual acts on the bookstore premises may ultimately face the specter of closure. The Respondent has never argued otherwise but maintains

that the payment of tax arrears or the correction of housing code violations will forestall foreclosure and amount to the least drastic means of abating the problem. Here, however, even though a limited injunction directed specifically at the offending conduct would abate the nuisance, the Petitioners argue for a total blanket closure for a one-year period. The court below simply recognized and applied the well settled principal that where a less draconian remedy may abate the nuisance alleged by Petitioner, it must be attempted. See, generally, Shelton v. Tucker, 364 U.S. 479, 488 (1960); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68; Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 636.

Both in its analysis and its

application of law to fact the New York Court of Appeals exercised reason and restraint. It determined that, taking the allegations of sexual misbehavior as true, total closure for no less than one year could not be permitted in circumstances where the less onerous restraint of injunction, as provided for by the statute in question (A-19), had never even been attempted by the District Attorney. So finding, the Court granted the motion for partial summary judgment since no factual issue remained for resolution. Its holding does not represent, either realistically or theoretically, any invalidation of the statute. Indeed, the Court suggested that the injunctive apparatus of Article 23, Title II might be utilized by the Petitioner in controlling the alleged

nuisance (A-19). The Court did not strike the closure provisions of the statute, but said that "under these circumstances" (A-19), closure was not essential and thus could not justify the consequent devaluation of the First Amendment.

Finally, Petitioner's argument that Supreme Court review is necessitated by the conflict among the state courts is unavailing. In two of the three cases cited by Petitioner, Commonwealth v. Croatan Books, Inc., 323 S.E.2d 86, and People ex rel. VanDeKamp v. American Art Enterprises, Inc., 75 Cal.App.3d 523, 142 Cal. Rptr. 338, the balancing test of United States v. O'Brien was employed. In Croatan Books, closure was permitted only after the trial court's order of temporary injunc-

tive relief (designed to eliminate the nuisance but permit the store to remain open) was proved ineffective, thereby necessitating a more drastic remedy. In VanDeKamp, the question of closure became moot when the store owners voluntarily abated the nuisance by rental of the premises. People ex rel. VanDeKamp v. American Art Enterprises, Inc., 33 Cal.3d 328, 656 P.2d 1170.

In the third case cited by the Petitioner, Commonwealth ex rel. Lewis v. Allouwill, ___ Pa. Super ___, 478 A.2d 1334, the Court did not find O'Brien applicable and permitted closure. The deviation of that last holding does not represent a serious conflict which should be reviewed by this Court, particularly where so many courts have recognized the drastic

nature of the closure remedy and thus, the need for careful analysis and limited application where the First Amendment is implicated.*

The holding below is a sober and considered ruling which invites review no more than it invites Petitioner's chaotic vision of a brothel on every street corner insulated from sanction by virtue of the magazine rack in its doorway. That picture of pervasive moral decay is not justified and the insubstantial analysis which provokes it

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* See, e.g., General Corporation v. State ex rel. Sweeton, 294 Ala. 657, 320 So.2d 668, cert. denied, 425 U.S. 904; People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42, 130 Cal. Rptr. 328, cert. denied, 429 U.S. 922; State v. A Motion Picture Entitled "The Bet," 219 Kan. 64, 547 P.2d 760; Sanders v. State, 231 Ga. 608, 203 S.E.2d 152; State ex rel. Field v. Hess, 540 P.2d 1165 (Okla.)

should not further engage this Court.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL JOHN CAMBRIA, JR., ESQ.
Attorneys for Respondents
Office & Post Office Address
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Buffalo, New York 14202
(716) 849-1333

MARY GOOD, ESQ., Of Counsel

JOINT

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD J. ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY,

Petitioner,

vs.

CLOUD BOOKS, INC., etc., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

JOINT APPENDIX

RICHARD J. ARCARA
District Attorney of Erie County
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LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES
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PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1985.
CERTIORARI GRANTED NOVEMBER 12, 1985.

Daily Record Corporation
Rochester, New York

(12141)

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10/7/82	Motion to dismiss of Blanche Dudley
10/8/82	Affidavit of Cloud Books opposing plaintiff's application for a preliminary injunction
10/12/82	Answer of Charles A. Ottaviano
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10/26/82	Memorandum Decision of Hon. John C. Broughton denying Plaintiff's application for preliminary injunction
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CLOUD BOOKS' MOTION FOR PARTIAL SUMMARY JUDGMENT DATED NOVEMBER 2, 1982

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PEOPLE ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,
Plaintiff,

vs.

CLOUD BOOKS, INC. D/B/A VILLAGE BOOK & NEWS STORE, CHARLES OTTAVIANO, et al.
Defendants.

NOTICE OF MOTION
FOR PARTIAL SUMMARY JUDGMENT
Index No. H18895

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of PAUL J. CAMBRIA, JR., ESQ., sworn to on the 2nd day of November, 1982, the Summons, Verified Complaint, the Verified Answer thereto and upon all the pleadings heretofore filed herein, a motion pursuant to CPLR 3212(e) will be made at a Special Term of this Court to be held at the Erie County Courthouse, Buffalo, New York on the 10th day of November, 1982 at 1:45 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an Order granting the Defendant Cloud Books, Inc. partial summary judgment and dismissing those portions of the Verified Complaint which seek to:

(1) Permanently enjoin the defendant Cloud Books, Inc. from lawfully conducting presumptively protected business activities, including the sale and/or display of magazines and motion pictures;

(2) Directing the Erie County Sheriff to remove and sell all furniture, fixtures and personalty located at the premises of the Village Book and News Store; and

(3) Effectually closing the Village Book and News Store by prohibiting its use for any purpose by the defendant Cloud Books, Inc. for any period of time.

PLEASE TAKE FURTHER NOTICE that the Defendant Cloud Books, Inc. will further move pursuant to CPLR 3212(e) for an Order severing the above-referenced prayers for relief from the balance of the relief requested in the Verified Complaint, on the ground that such relief would constitute an unconstitutional and permanent prior restraint on the Defendant Cloud Books, Inc.'s ability to engage in business activities presumptively protected by the First Amendment and Fourteenth Amendments to the United States Courthouse [sic] as well as Article I, Section 8 of the New York State Constitution, and for such other, further and different relief as may be just and proper under the circumstances.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b), all answering affidavits, if any, are required to be served upon the undersigned at least two (2) days prior to the return date of this motion, to wit: November 8, 1982.

DATED: Buffalo, New York
November 1, 1982

Yours, etc.

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.
Attorneys for Defendant
CLOUD BOOKS, INC.
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

TO: RICHARD J. ARCARA
District Attorney, Erie County
Erie County Hall
Buffalo, New York 14202
ATTN: LOUIS A. HAREMSKI, ESQ.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PEOPLE ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,
Plaintiff,

vs.

CLOUD BOOKS, INC. D/B/A VILLAGE BOOK & NEWS STORE, CHARLES OTTAVIANO, et al.
Defendants.

AFFIDAVIT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
CITY OF BUFFALO)

PAUL J. CAMBRIA, JR., being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice in the State of New York and am a partner in the law firm of Lipsitz, Green, Fahringer, Roll, Schuller & James with offices located at One Niagara Square, Buffalo, New York, 14202.

2. I represent the Defendant CLOUD BOOKS, INC. D/B/A Village Book & News Store and appear as such as the attorney for the corporation.

3. I make this affidavit upon my personal knowledge and upon information and belief, the source of said information and grounds for such belief being my review of the papers and pleadings submitted by the Plaintiff, my independent investigation into the facts underlying the present matter and my interviews

and conversations with various employees of the Defendant Cloud Books, Inc.

4. This affidavit is submitted in support of a motion pursuant to CPLR 3212(e) for a partial summary judgment in favor of Cloud Books, Inc. Specifically, the Defendant Cloud Books, Inc. seeks an Order of this Court dismissing and severing those portions of the Plaintiff's Verified Complaint which seek:

(1) To permanently enjoin the defendant Cloud Books from lawfully conducting presumptively protected business activities at the Village Book and News Store, including the sale and/or display of magazines and motion pictures;

(2) To direct the Erie County Sheriff to remove and sell all furniture, fixtures and personalty from the Village Book and News premises; and

(3) To effectively close the Village Book and News Store and prohibit the defendant Cloud Books from using it for any purpose for any period of time.

5. The present action was commenced on October 1, 1982 by the service and filing of an Order to Show Cause, Summons and Verified Complaint, which purports to commence an action for a common law nuisance as well as for a nuisance under Public Health Law § 2320 *et seq.* (annexed hereto as Exhibit "A" is a copy of these papers). Initially, the Plaintiff sought to preliminarily enjoin the Defendant Cloud Books from, in any way or manner:

(1) Continuing or maintaining the Village Book & News Store as a nuisance or the situs of any unlawful acts and from removing or damaging the furniture, fixtures and personal property used in conducting such nuisance; and

(2) From, either directly or indirectly, directing, establishing, continuing, using, owning or permitting the prem-

ises of the Village Book & News to be used for the purpose of lewdness, assignation or prostitution and from continuing or maintaining the premises as a nuisance or the situs of any unlawful acts. (*See* Verified Complaint, pp. 15-17).

6. Thereafter, on or about October 8, 1982, oral argument was held before this Court, Hon. John C. Broughton presiding, upon the Plaintiff's request for preliminary injunctive relief. This request for relief was denied by Justice Broughton by Memorandum Decision dated October 26, 1982 on the grounds, *inter alia*, that the allegations alleged in the Verified Complaint were insufficient as a matter of law to justify the grant of the preliminary injunction (annexed hereto as Exhibit "B" is a copy of the Memorandum Decision of Justice Broughton). Previously, the Hon. Rudolph V. Johnson denied a request for a Temporary Restraining Order on similar grounds.

7. Subsequently, issue was joined by service of defendant Blanche Dudley's Verified Answer on or about October 8, 1982* (annexed [sic] hereto as Exhibit "C"), service of the Defendant Cloud Books, Inc.'s Verified Answer on October 19, 1982 (annexed hereto as Exhibit "D") and service of the Defendant Charles Ottaviano's Verified Answer on or about October 19, 1982 (annexed hereto as Exhibit "E").

8. Through their Verified Complaint, the Plaintiff requested this Court to enter an Order:

(1) Permanently restraining the Defendant Cloud Books from using the furniture, fixtures and personalty located at Village Book and News for an alleged nuisance (*see* Exhibit "A", p. 15, Item No. 3);

* On October 27, 1982 by the consent of the District Attorney, and by Order of this Court, Hon. William J. Ostrowski presiding, the Complaint as it applied to Ms. Dudley was dismissed.

(2) Directing the Sheriff of Erie County to remove from the Village Books and News *all* furniture, fixtures and personalty "of whatever kind and nature" which was allegedly used in conducting or maintaining the purported nuisance (*see* Exhibit "A", p. 15, Item No. 6);

(3) Directing the Sheriff to "effectually close the building or place, prohibiting its use for any purpose and to keep the same closed as provided by law" (*see* Exhibit "A", p. 16, Item No. 6).

9. It is respectfully submitted that the Defendant Cloud Books, Inc. is entitled, as a matter of law, to partial summary judgment denying and dismissing the above-mentioned portions of the Plaintiff's Verified Complaint which seek to permanently prohibit or effectively prevent the Defendant Cloud Books from continuing to lawfully operate a business which engages in the dissemination of materials presumptively protected by the First and Fourteenth Amendments to the United States Constitution as well as by Article I, Section 8 of the New York State Constitution. In this regard, it is submitted that any permanent restraint of any duration imposed upon Cloud Books' ability to sell or display books, magazines or films would constitute an impermissive and unconstitutional prior restraint and would far exceed any authority to regulate an alleged nuisance and thereby constitute an overbroad and thus unconstitutional restraint.

10. The prime Constitutional problems posed in this case are directly due to the inartful, vague and conclusory manner in which the Verified Complaint, including the requests for relief, is drafted. For example, a fair reading of the Verified Complaint indicates that six purported activities of public lewdness engaged in by patrons of the Village Book and News Store (*see* Penal Law § 245.00) and four alleged acts of solicitation for prostitution

(*see* Penal Law § 230.00)* occurred (*see* Verified Complaint, paragraphs 9[A] through 9[R]).

11. Plaintiff explicitly requests that the Defendant Cloud Books be "permanently restrained from the continuance of said nuisance and of said unlawful acts in or upon the premises." (*See* Verified Complaint, p. 14, Item No. 2.) However, the Plaintiff's request does not end there.

12. The Plaintiff has further explicitly requested that this Court impose a permanent restraint upon the Defendant's ability to engage in presumptively protected business activity by:

(1) Requesting an Order directing the Sheriff to seize and sell all furniture, fixtures and personalty located at the Village Book and News; and

(2) Requesting an Order effectively closing the Village Book and News Store.

13. It is submitted that any type of injunction which would authorize the closure, seizure and/or destruction of furniture, fixtures and personalty which is regularly used by the Defendant Cloud Books to conduct its presumptively protected business cannot constitutionally issue. That is, your deponent asserts that under the relevant decisions of the United States Supreme Court and the courts of this state, the Plaintiff cannot constitutionally prevail on its request for permanent injunctive relief in the sweeping form proposed since, in essence, the Plaintiff seeks to prohibit, in the future, presumptively protected activities based upon allegations that, sometime in the past, unprotected conduct and/or activity occurred. *See Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975); *Near v. Minnesota*, 283 U.S. 697 (1930); *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir.

* The occurrence of these activities has been specifically denied by the Defendant Cloud Books, Inc. See Verified Answer, paragraphs 8, 10, 11 and 12.

1980), *aff'd*, — U.S. —, 102 S.Ct. 557 (1981); *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978), *aff'd*, 455 U.S. 308 (1980); *Brown v. Kingsley Books*, 1 N.Y.2d 177, 151 N.Y.S.2d 639 (1956), *aff'd*, 354 U.S. 436 (1957); *Cosgrove v. Cloud Books, Inc.*, 83 A.D.2d 789, 443 N.Y.S.2d 450 (4th Dept. 1981); *People ex rel. Busch v. Projection Room Theatre*, 130 Cal.Rptr. 328, 550 Pac.2d 600 (1976).

14. Succinctly stated, your deponent asserts that if the Verified Complaint is read in such a manner as to afford the Plaintiff the relief requested, specifically to prevent it from continuing to show presumptively protected films, or otherwise use the building as an "adult book store" due to allegations that acts and/or conduct other than the sale or exhibition of books and movies occurred there in the past, any injunction issued would constitute a total and final restraint upon presumptively protected activity and would restrain the Defendant from continuing to disseminate materials which are clearly protected by the United States and New York State Constitutions and thus reach far byond [sic] the alleged activity asserted.

15. It is well-settled that motion pictures are a form of expression presumptively protected by the First Amendment (*Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 [1968]; *Kingsley Picture Corporation v. Regents*, 360 U.S. 684 [1969]) as is their exhibition through means of coin-operated devices (*414 Theatre Corporation v. Murphy*, 360 F.Supp. 34 [S.D.N.Y. 1973]) *aff'd* 499 F.2d 1155 [2d Cir. 1974]; *City of New York v. S & H Book Shop*, 41 A.D.2d 637, 341 N.Y.S.2d 292 [1st Dept. 1973]; *People v. Mitchell*, 74 Misc.2d 1053, 346 N.Y.S.2d 495 [Crim. Ct. of New York City, 1973]).

16. Furthermore, it is equally well-settled that a corporation enjoys the full panoply of protections afforded by the First Amendment (*Bantam Books, Inc. v. Sullivan*, 372 U.S. 558 [1963]). Thus, if any restraint is placed upon the ability to dis-

seminate motion picture films, or other presumptively protected materials, even for the most minimal period of time, a prior restraint exists. However, since "[a]ny system of prior-restraint on expression . . . bear[s] a heavy presumption against . . . Constitutional validity" (*Organization For a Better Austin v. Keef*, 402 U.S. 415, 419 [1971]; *Bantam Books, Inc.*, 372 U.S. at 70) any injunction which would impose a future prohibition on the untrammeled dissemination of presumptively protected material based upon the allegation that past unprotected conduct occurred is clearly unwarranted and unconstitutional. *See Near v. Minnesota*, 283 U.S. 697 (1931).

17. Thus, in this case, any permanent relief which would result in the closure of the Village Book and News Store, or which would otherwise restrict the Defendant's ability to sell or display books, films or magazines in the future, based solely upon allegations that non-film or book activity occurred in the past, would clearly constitute an impermissible and unconstitutional prior restraint. This is so despite the fact that closure is based upon alleged incidents of prior unprotected conduct on the premises which are completely and totally unrelated to First Amendment activities. Accordingly, for this reason alone, Defendant's request for a partial summary judgment must be granted in all respects since the relief requested by the Plaintiff far exceeds that which may be constitutionally imposed.

18. Additionally, it is submitted that if the Plaintiff were allowed to obtain an Order of this Court authorizing the seizure and destruction of furniture, fixtures and personalty, this would constitute, in effect, a massive seizure of all of the materials presently in the Defendant Cloud Books, Inc.'s business premises without affording it the Constitutionally mandated prior adversorial [sic] hearing required. *See Southeastern Promotions, Ltd. v. Conrad*, *supra*; *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v.*

Search Warrant, 367 U.S. 717 (1961); *Kingsley Books v. Brown*, 354 U.S. 437 (1957).

19. Moreover, since the appropriate statutory scheme under which the Plaintiff is seeking an injunction (the provisions of Public Health Law § 2320 *et seq.*), does *not* contain the necessary Constitutional protections mandated by *Southeastern Promotions, Ltd. v. Conrad*, *supra*; *United States v. 37 Photographs*, 402 U.S. 363 (1971); *Freedman v. Maryland*, *supra*; *Kingsley Books v. Brown*, *supra*, any restraint imposed would be clearly unconstitutional.

20. In this regard, it is respectfully asserted that if a permanent injunction were issued pursuant to Public Health Law § 2323, any violation of this injunction would subject the Defendant Cloud Books to a contempt proceeding pursuant to Public Health Law § 2327. Thus, for example, if the Defendant Cloud Books disseminated materials presumptively protected by the First Amendment anywhere in this state, it would then be required to defend itself upon a contempt proceeding which would not afford a prompt and final judicial determination of the obscenity of the materials disseminated nor, for that matter, allow the Defendant to plead non-obscenity as a defense to the contempt. Lastly, the Plaintiff, in instituting the contempt proceeding, would not have the burden of proving that the materials disseminated were obscene, and thus not Constitutionally protected. Rather, the sole standard of proof would be for the Plaintiff to establish that a permanent injunction had been issued and that the Defendant had disseminated or sold personal property covered by the injunction *anywhere in the state*. Such a blanket and complete ban, however, is Constitutionally intolerable and would be imposed in the absence of the relevant Constitutional safeguards.

21. Additionally, a permanent injunction could be gained under § 2323 without any requirement for a prompt trial on the

merits or a decision once the trial is completed within a specified short period of time as is required when First Amendment materials are involved pursuant to *Freedman* v. *Maryland*, *supra*. *See e.g.*, CPLR 6330. Doubtless, this is due to the fact that § 2320 *et seq.* was not intended to apply in First Amendment areas and, therefore, none of the required safeguards were included in the statute, and it is unconstitutional as applied here.

22. Lastly, another problem of constitutional dimension is also raised by the enforcement procedures outlined in Article 23, Title 2 of the Public Health Law. Specifically, the Verified Complaint alleges, and the Plaintiff seeks, to abate a "nuisance" which is predicated upon facts which also constitute violations of the Penal Law (See Penal Law §§ 230.00; 230.15, 230.20, 230.25, 230.30, 230.32, 230.40, 240.35[3]; 240.37, 240.45, 245.00).

23. Thus, the provisions of the Public Health Law define these activities, which are also criminal, as a "nuisance" capable of being abated by an injunction brought in the name of the People upon the relation of the District Attorney (Public Health Law § 2321[1]). However, were a civil court to enjoin the activity, and the individual who was enjoined continued to persist in the conduct, they could be summarily tried by the Court merely upon affidavits and punished pursuant to the provisions of Public Health Law § 2328 to pay a fine or be imprisoned up to a term of six months for the first offense (See Public Health Law § 2327[3]).

24. Thus, if the Plaintiff is granted the relief in the form requested, there is a very real possibility that an individual or corporation enjoined by the injunctive process could eventually be imprisoned and fined without the Constitutional procedural safeguards traditionally associated with criminal prosecutions in this state, most notably, one's right to a trial by jury (Article III, Section 2, Clause 3 and the Sixth Amendment of the United States Constitution; Article I, Section 2 of the New York State

Constitution; Article 360 of the Criminal Procedure Law); one's right to be presumed innocent until proven guilty beyond a reasonable doubt (CPL §§ 70.20, 300.10[2]); and, additionally, the right to confront and cross-examine all witnesses against them (Sixth Amendment to the United States Constitution, Article I, Section 6 of the New York States Constitution). (*See* Memorandum Decision of Justice Broughton, pp. 11-12).

25. Thus, it is clear that as a matter of Constitutional law, the sole scope of relief available to the Plaintiff in this case consistent with the First Amendment is an Order which would direct the cessation of those unprotected activities alleged in the Verified Complaint which, to date, have been unproven and are completely contradicted in the Defendant's Verified Answer.

26. Nevertheless, regarding the unconstitutional scope of any relief sought, since all that is needed to be decided is a question of law, it is clear that a motion for a partial summary judgment in this regard is not only proper but completely warranted. *See Rosman v. Transworld Airlines, Inc.*, 34 N.Y.2d 385, 392, 358 N.Y.S.2d 97, 103 (1974); *Hartford Accident & Indemnity Company v. Wesolowski*, 33 N.Y.2d 169, 172, 350 N.Y.S.2d 895, 898 (1973); *Balducci v. Merchants Nat. Bank & Trust Co.*, 74 Misc.2d 406, 345 N.Y.S.2d 263, 267 (S.Ct. Onandaga Co. 1972) *aff'd* 41 A.D.2d 1030, 344 N.Y.S.2d 828 (4th Dept. 1973); *O'Connell v. Gannett Co., Inc.*, 77 Misc.2d 344, 353 N.Y.S.2d 144 (City Ct. Rochester 1974). Indeed, it is clear that a motion for partial summary judgment may be granted to the part of a cause of action or as to parts of requested forms of relief, where the sole questions in issue are ones of law. *See Cosgrove v. Cloud Books, Inc.*, 83 A.D.2d 789, 443 N.Y.S.2d 450 (4th Dept. 1981); *Levey v. Saphier*, 74 A.D.2d 918, 426 N.Y.S.2d 79 (2d Dept. 1980).

27. It is clear therefore that partial summary judgment is appropriate since there does not exist any fact issue of sufficient import to create a triable issue (*Shaw v. Time-Life Records*, 38

N.Y.2d 201, 379 N.Y.S.2d 390 [1975]). Rather, the only issue raised by the present motion is whether, as a matter of Constitutional law, the Plaintiff is entitled to the relief it has requested which would, in fact, impose a prior restraint as well as the other constitutional infirmities previously outlined.

28. It is further requested that this Court not only enter a partial summary judgment dismissing and denying the requested forms of relief but, additionally, that this Court enter an Order dismissing and denying and striking the Plaintiff's second cause of action which purports to plead an action pursuant to Public Health Law § 2320 *et seq*.

29. The only forms of relief authorized by the provisions of the Public Health Law are contained in § 2329 which, in essence, authorizes the seizure and removal of all fixtures, furniture, etc. used in conducting a muisance [sic] as therein defined as well as the closing of the building. Since this sort of injunction would constitute an impermissible prior restaint, it clear that under any facts, an injunctio:: pursuant to Public Heal [sic] Law § 2329 cannot constitutionally issue. Thus, it is asserted that the second cause of action must be stricken in its entirety.

30. It is further respectfully submitted that no previous application for the relief sought herein has been made in this or any other court by this Defendant in this action.

WHEREFORE, Defendant respectfully requests that an Order be granted awarding a partial summary judgment against the Plaintiff dismissing, denying and severing those portions of the Verified Complaint which seek:

(1) To permanently enjoin the Defendant Cloud Books from lawfully conducting presumptively protected business activities;

(2) To direct the Erie Co:rty Sheriff to remove, seize and sell all furniture, fixtu:es and personalty owned by the

Defendant Cloud Books, Inc.;

(3) To effectively close the Village Book and News Store and prohibit its use by Cloud Books, Inc. for any purpose;

(4) An Order directing the seizure of all materials at the Village Book and News premises;

(5) Any relief pursuant to the Public Health Law.

The Defendant Cloud Books, Inc. further requests such other, further and different relief as is just and proper under the circumstances.

ARCARA ANSWERING AFFIDAVIT
DATED NOVEMBER 8, 1982

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHAkD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,
Plaintiff

-vs-

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOKS AND NEWS,
CHARLES A. OTTAVIANO,
BLANCHE DUDLEY and
"all other persons unknown claiming
any ownership, right, title or
interest in the property affected
by this action"
Defendants

AFFIDAVIT IN OPPOSITION TO
MOTION FOR PARTIAL SUMMARY JUDGMENT
Index No. H 18895

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

ALBERT M. RANNI, being duly sworn, desposes and says:

1. I am an attorney at law duly admitted to practice in the State of New York and am Deputy District Attorney appearing of counsel to Richard J. Arcara, District Attorney of Erie County, on behalf of the People of the State of New York.

2. I make this affidavit in opposition to defendant Cloud Books' motion for partial summary judgment.

3. Defendant's application makes serious miss'atements as to the relief requested by plaintiff, the grounds therefore and the constitutional implications which arise.

4. Plaintiff does not, as defendant would have this Court believe, seek closure of the facility on the ground that it has, in the past, been convicted of promoting obscene materials. In fact, at no point in the verified complaint is reference made to any convictions or prosecutions which have occurred.

5. Contrary to the notion that the nuisance which plaintiff seeks to abate is the sale of books and magazines of a sexually explicit nature, the thrust of the lawsuit is to abate that nuisance which consists of sexual acts and solicitations within the premises operated by defendant Cloud Books.

6. Although this action seeks an injunction of state-wide scope, that injunction would only preclude the maintenance of a nuisance and would have no effect upon the sale of books and magazines.

7. Because of the First Amendment restrictions on prior restraint, plaintiff has not requested an injunction which would, in any way, restrict the sale of materials entitled to First Amendment protection.

8. To the extent that defendant's application seeks to characterize the relief requested as a "blanket and complete ban" on the sale of presumptively protected materials, defense counsel's affidavit completely misstates the relief requested and constitutes an irresponsible attempt to engender unfounded fears regarding the freedom of expression.

9. Defendant improperly attempts to utilize the First Amendment not as shield to defend protected expression but as a sword

to justify the commission of independently illegal acts on its premises, solely because of its character as a bookstore.

10. Plaintiff's request for closure of the bookstore is not predicated upon the sale of any books or magazines but upon the illegal acts which the bookstore has allowed to occur. The seizure of all personalty within the premises is similarly based upon the character of the acts which have occurred on the premises and not upon the character of the materials.

11. Although defendant has denied both the commission of those acts and the knowledge that they occurred, the denials have served only to place into issue facts which must be tried. Although defense counsel's affidavit states that the allegations are, to date, unproven and completely contradicted, a number of the allegations of the complaint are controverted solely on the basis that defendant "denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations . . ."

12. There exist, therefore, factual issues which require a full trial on the merits.

13. The statute under which this lawsuit is brought applies to any "building, erection, or place used for the purpose of lewdness, assignation, or prostitution . . ." (PHL §2320) and does not legitimize the aforesaid conduct solely because books and periodicals are distributed at the premises.

14. Plaintiff seeks closure not *because* the premises is a bookstore but *in spite of* that fact.

15. Because the premises has additioally [sic] been used for purposes which are clearly beyond constitutional protection, proof of that fact alone is sufficient to command closure and the issue of obscenity or non-obscenity is irrelevant.

16. Any further judicial proceedings after the issuance of a permanent injunction would be focused not on the obscene character of any publication but upon whether the prohibited acts such as lewdness, prostitution and solicitation had occurred. Such a determination, in order to uphold a contempt citation, would not be entitled to the full panoply of constitutional protections, since obscenity would not be an issue. Willful violation of a court order has always been punishable by summary contempt proceedings and does not entitle the wrongdoer to a trial by jury.

17. Contrary to defendant's allegation, the sale of any materials entitled to First Amendment protection could not give rise to the summary contempt proceedings under the Public Health Law. Plaintiff respectfully alleges that even a conviction under the Penal Law for obscenity could not constitute a violation of the injunction.

18. In view of the factual issues which have been raised in this lawsuit, (lack of knowledge, denial of occurrence, lack of corporate acquiescence, lack of managerial capacity of certain employees, etc.), the matter is not properly before this Court on a motion for summary judgment.

19. Moreover, the determination of constitutional issues of the magnitude asserted by defendant is not proper on a motion for summary judgment. In view of the presumption attached to the statute that it is constitutional, and the wealth of issues raised by defendant in this application, the matter ought not be determined solely upon affidavits.

WHEREFORE, deponent respectfully requests that this Court deny defendant's motion in all respects.

PETITIONER'S

BRIEF

No. 85-437

In The

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD J. ARCARA, District Attorney of Erie County,
Petitioner,

vs.

CLOUD BOOKS, INC., etc., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR PETITIONER

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John J. DeFranks
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Of Counsel

Daily Record Corporation
Rochester, New York
(12204)

QUESTION PRESENTED

Where it is alleged that acts of masturbation, fellatio and prostitution are occurring on a premises denominated as a bookstore, does the First Amendment operate to immunize such premises from closure as a nuisance under New York State's Public Health Law?

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Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR PETITIONER

OPINIONS BELOW

In a memorandum decision dated May 31, 1983, New York Supreme Court Justice Thomas P. Flaherty denied respondent Cloud Books' motion for partial summary judgment in all respects. An order of the court was entered in the Erie County Clerk's Office on June 14, 1983. This decision is unreported but can be found on page A 37-A 50 of the Petition for Writ of Certiorari.

The order was appealed to the New York Appellate Division, Fourth Judicial Department which, on April 12, 1984 issued an opinion and order unanimously affirming the determination of the lower court (101 A.D.2d 163).

Cloud Books moved on May 15, 1984 for permission to appeal to the Court of Appeals. On July 13, 1984 an order was entered pursuant to Article 6, Section 3(b)(4) of the New York State Constitution and New York Civil Practice Law and Rules §§ 5602 and 5713 certifying the following two questions:

> (1) Whether Title II, Article 23 of the Public Health Law is applicable to enjoin a nuisance occurring on premises other than a house of prostitution?
>
> (2) Do statute's mandatory closure provisions constitute an impermissible prior restraint?

In an opinion reported at 65 N.Y.2d 324, the New York Court of Appeals with one justice dissenting in part, answered both questions in the affirmative modifying the order below.

JURISDICTION OF THIS COURT

The New York State Court of Appeals determined on June 13, 1985 that the mandatory closure provisions of Article 23, Title II of the New York Public Health Law constitute an impermissible prior restraint in violation of the First Amendment to the United States Constitution when applied to a premises housing a bookstore. Because the validity of a state statute was drawn into question on the ground of its being repugnant to the Constitution of the United States, jurisdiction is invoked under 28 U.S.C. § 1257(3).

The Petition for a Writ of Certiorari to the New York Court of Appeals was timely filed pursuant to 28 U.S.C. § 2101(c) on September 11, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE PUBLIC HEALTH LAW ARTICLE 23 — CONTROL OF SEXUALLY TRANSMISSIBLE DISEASES

TITLE II Houses of Prostitution: Injunction and Abatement

§ 2320. Houses of prostitution; equipment; nuisance

1. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.

2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property

used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided.

§ 2321. Houses of prostitution; injunction; jurisdiction, complaint and parties to the action

1. When a nuisance is kept, maintained, or exists, as defined in this article, the district attorney, or any citizen of the county, or any society, association, or body incorporated under the laws of this state, may maintain an action in equity in the name of the people of the state of New York, upon the relation of such district attorney, citizen, or corporation to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same from further conducting or maintaining the same, and the owner, or agent of the building or ground upon which said nuisance exists, from further permitting such building or ground or both to be so used.

§ 2329. Houses of prostitution; injunction; order of abatement; sale and removal of property; fees

1. If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in any court, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance and shall direct the sale of such in the manner provided for the sale of chattels under execution, and shall direct the effectual closing of the building, erection or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released as hereinafter provided.

§ 2332. Houses of prostitution; abatement; release of property on filing bond

1. If the owner of the premises in which a nuisance, as defined in this article, has been maintained appears and pays all costs of

the proceeding and files a bond with sureties to be approved by the court in the full value of the property, to be ascertained by the court, or in vacation by the judge thereof, conditioned that he will immediately abate said nuisance and prevent the same from being established, or kept therein within a period of one year thereafter, the court, or in vacation the judge, if satisfied of his good faith, may order the premises, closed or sought to be closed under the order of abatement, delivered to said owner, and said order of abatement cancelled so far as the same may relate to said real property.

2. The release of the property under the provisions of this section shall not release it from the injunction herein provided against the property nor any of the defendants nor from any judgment, lien, or liability to which it may be subject by law.

STATEMENT OF THE CASE

The present case derives from an action for an injunction to abate a nuisance located at 3102 Delaware Avenue, Kenmore, New York. Occupying the premises is the respondent Cloud Books, Inc. doing business as Village Book and News, a store which sells what respondent readily characterizes as material of a "sexually frank nature." In addition to sexually explicit books and magazines, the premises house a number of coin-operated movie booths which show explicit sexual material.

In September of 1982 as a result of an undercover investigation conducted by the Erie County Sheriff's Department, illegal activities unrelated to the sale of books or to the exhibition of films were discovered at the premises. As attested to in petitioner's verified complaint, these activities, observed by an undercover police officer, included masturbation, fellatio, prostitution, and the sale of drugs(A 53)[1]. The respondent's knowledge of the acts was

[1] Numbers in parentheses preceded by the letter "A" refer to pages in Appendices to the Petition for Writ of Certiorari.

demonstrated by the statements of store managers indicating that such acts were commmonplace and that the primary concern of the managers was that store patrons continue to "put quarters in the machines"(A 56-A 57).

On October 1, 1984, the petitioner, Richard J. Arcara, District Attorney of Erie County acting on behalf of the People of the State of New York, commenced legal proceedings against the respondents by service of a summons and complaint[2]. Two causes of action were stated, one in common law and one under Article 23, Title II of the Public Health Law. Under both causes of action the petitioner sought a temporary restraining order, a preliminary injunction and a permanent injunction. Pursuant to the provisions of the above article and title, petitioner also sought an order of closure for the statutorily prescribed period of one year. The request for a temporary restraining order was denied as was the application for a preliminary injunction. The denial of injunctive relief was subsequently affirmed by the Appellate Division (96 A.D. 2d 751).

On November 1, 1982, the respondent Cloud Books, Inc. moved for partial summary judgment with respect to the statutory cause of action, contending that the statute was inapplicable to the bookstore inasmuch as it concerned only houses of prostitution as that term is generally understood. It was also contended that the statutory provisions at issue constituted an impermissible prior restraint on the exercise of First Amendment rights. The respondent's motion was denied by order of the Erie County Supreme Court entered on June 14, 1983 (Flaherty, J.).

Respondent appealed this decision to the New York Appellate Division, Fourth Department, which on April 12, 1984 unanimously affirmed the decision below. Regarding the first issue, the court determined that the statute under consideration was applicable to a bookstore, noting that judgment for the plaintiff could not be based upon a single illicit act but only upon proof of a consistent pattern of proscribed conduct. On the question of whether the mandatory closure provision of the statute would impermissibly infringe upon respondent's First Amendment freedoms, the court concluded that it would not. Under the reasoning of the court, application of the Public Health Law could not constitute a prior restraint on protected First Amendment speech since the prosecution was seeking to employ the statute only to enjoin illegal conduct, not to regulate the content of the materials disseminated by the store. As observed by the court, "The mere fact that illegal activity or conduct occurs on the premises of a bookstore does not elevate every attempt to enforce the law on those premises to a question of constitutional dimension" (A 33).

[2] The owner of the premises, Charles Ottaviano, was also a party-defendant throughout the proceedings below.

In a concurring opinion, one justice of the court expressed concern that the court was premature in reaching the constitutional issue relating to the statutes' sanctions since, "[t]here has been no trial and no verdict from which defendant is aggrieved." It was further observed that even should the People prevail at trial, the defendant "may move to cancel the order of abatement" under Public Health Law § 2332 (A 36).

The respondent's application for leave to appeal to the New York Court of Appeals was granted on July 13, 1984 with respect to the two certified questions set out above. On June 13, 1985, that court, by a majority of five with one justice dissenting in part, ordered the judgment below to be modified in accord with its opinion. In agreement with the lower court, the Court of Appeals found that the scope of Title II of the Public Health Law is not limited to traditionally recognized houses of prostitution. However, rejecting the lower court's conclusion on the constitutional issue, the Court of Appeals held the closure provision of the Public Health Law to constitute an impermissible prior restraint under the facts of the case. In support of this finding, the

court focused upon a determination that closure of the bookstore would have an "incidental" effect upon the sale of printed matter. On this ground the court applied the rationale of this Court's decision in *United States v. O'Brien,* 391 U.S. 367, and determined that the failure to ensure that the "incidental restriction on alleged First Amendment freedoms is no greater than is essential" (A 17 citing *O'Brien, supra*) rendered the statutory provision at issue unconstitutional. Finding that the petitioner had not demonstrated that the injunctive relief provided for in Title II would be insufficient to abate the nuisance under consideration, the court concluded that "closure of defendant's bookstore is not essential to the furtherance of the purposes underlying Title II, and is thus an unconstitutional restraint on defendant's First Amendment rights" (A 19). The single partial dissent, describing the court's decision as an advisory opinion, reiterated the position of the lower court dissent that "the closure challenged by defendant is presently speculative and resolution of its constitutionality seems unnecessary at this point" (A 20).

The People ex rel. Richard J. Arcara, District Attorney of Erie County, petitioned this Court for a Writ of Certiorari to the New York Court of Appeals. The petition was granted on November 12, 1985.

SUMMARY OF ARGUMENT

New York Public Health Law Art. 23, Title II, § 2329 provides for the closure of a premises found to be a health nuisance upon a finding that continuing acts of prostitution, lewdness and assignation are occurring upon such premises. Observing that such closure would incidentally affect respondent Cloud Books' bookselling enterprise by necessitating its relocation, the New York Court of Appeals applied the test enunciated by this Court in *United States v. O'Brien,* 391 U.S. 367. The court concluded that since closure did not represent the least restrictive means to

abate the nuisance alleged to have existed upon the bookstore premises, the statute's closure provision constituted an impermissible prior restraint.

Prior restraint involves the content censorship of protected expression or the denial of an adequate forum for the exercise of First Amendment freedoms. Its bane is the chilling effect it visits upon the open exchange of ideas or messages integral to a free society. The statute under review does not operate to control the content of any First Amendment expression or deny all access to protected materials. Nor was it intended to elevate the rights of certain individuals over those of their neighbors because of occupational status. The closure provided for under the Public Health Law, hopefully a deterrent to those who choose to engage in or allow lewdness or prostitution to exist on their premises, does not even minimally inhibit the freedom of individuals to engage in legitimate speech-related activity.

Concentrating upon incidental effect alone, the Court of Appeals applied the four-pronged test established by this Court in *United States v. O'Brien* despite that respondents' exercise of First Amendment rights could never subject their premises to closure under the statute. In a gloss over the fact that the sexual activity sought to be controlled on the bookstore premises included no expressive element, the Court disregarded the necessary precondition of *O'Brien* that the test be employed in cases where the government seeks to regulate conduct with an asserted expressive element.

Beyond failing to discern the irrelevance of the *O'Brien* rationale to the present case, the Court of Appeals erred even in the mechanical administration of the *O'Brien* test. The court determined that the abatement of a public nuisance was within the power of the government, that it furthered an important governmental interest and that the interest in regulating prostitution and sexual activity was unrelated to free speech. It held, however,

that the district attorney had not demonstrated that a means less restrictive than closure, i.e. injunction, would be insufficient to abate the nuisance.

Significantly there had been no opportunity for the district attorney to demonstrate that injunction would be ineffective. A temporary restraining order and preliminary injunction to abate the sexual conduct had been denied. Further, the proof by affidavit that acts of masturbation, fellatio and prostitution were commonplace at the bookstore, despite a clear corporate policy not to allow such activity, indicated the ineffectiveness of any remedy reliant upon the management's initiative in the control of the illicit activity.

As this Court has previously determined, a neutral regulation having an incidental effect upon speech is no greater than is essential if it promotes a substantial governmental interest that would be achieved less effectively absent the regulation (*United States v. Albertini*, ____U.S.____, 105 S.Ct. 2897, 2907). The validity of such regulation is not dependent upon judicial agreement with the regulatory authority as to the method utilized to promote a significant governmental interest (*Id.* at 2907, *Clark v. Community for Creative Non-Violence*, ____ U.S. ____, 104 S. Ct. 3065, 3072). The Court of Appeals' disagreement with the New York State Legislature that closure serves best to abate a health nuisance should not have translated into an invalidation of the closure provision upon federal constitutional grounds.

Where closure of a premises found to be a public nuisance incidentally restricts the right to engage in First Amendment activity at such premises, the closure can be viewed as no more than a legitimate time, place or manner restriction on speech. The protection afforded the public health by abatement of the alleged health nuisance represents a significant governmental interest unrelated to speech. The closure remedy is specifically tailored not only to abate the illicit conduct but also to rehabilitate the premises used for such conduct. In that the respondent Cloud

Books, Inc. would be allowed to continue its sale of protected publications at every site except the one subject to non-speech related closure, it cannot be legitimately argued that access to an adequate forum for the exercise of their First Amendment rights would be denied. (*Community for Creative Non-Violence, supra*). Such restriction on the time and place of distribution as would occur from imposition of closure must in these circumstances be viewed as reasonable and, thus, constitutionally permissible.

In its invalidation of the closure provision of the Public Health Law, the Court of Appeals has conferred a status-based immunity upon premises purporting to exist as a bookstore. This action, clearly in contravention of New York's legitimate interest in protecting the health and welfare of its citizens, was neither required nor authorized under the First Amendment to the Constitution of the United States.

Accordingly the judgment of the Court of Appeals should be reversed.

POINT

THE CLOSURE PROVISION OF NEW YORK PUBLIC HEALTH LAW ARTICLE 23, TITLE II DOES NOT CONSTITUTE AN IMPERMISSIBLE PRIOR RESTRAINT AND IS NOT VIOLATIVE OF RIGHTS GUARANTEED UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The issue presented by the case at bar concerns the constitutional validity of the mandatory[3] closure provision of Public

[3] While Art. 23, Title II, § 2329 states that the order entered upon the finding of a health nuisance *shall* direct the effectual closure of the premises, § 2332 provides for a discretionary release of the closure order upon the filing of a bond by the owner of the premises.

Health Law Art. 23, Title II, as applied to premises housing a bookstore. In September of 1982, the Erie County Sheriff's Department initiated an undercover investigation of activities occurring on premises purporting to be a bookstore, operated by the respondent Cloud Books, Inc. It was discovered that acts of masturbation, fellatio, and solicitation for prostitution were being committed on an apparently habitual basis with the consent of Cloud Books' managerial personnel. As a result of this investigation, the Erie County District Attorney commenced an action to have the premises declared a nuisance pursuant to Public Health Law § 2320 and to have the nuisance abated by closure under the authority of Public Health Law § 2329.

Cloud Books, Inc. moved for summary judgment, contending first that Title II was not applicable to the store because it is directed only at houses of prostitution as that term is generally understood, and second, that the issuance of an injunction against the bookstore would constitute an impermissible prior restraint upon presumptively protected activity. As is required by New York law, for purposes of the motion for summary judgment, Cloud Books, Inc. conceded the existence of the sexual acts documented by the district attorney (*Patrolmen's Benevolent Association of City of New York v. City of New York*, 27 N.Y.2d 410).

Respondent's motion was denied by the trial court and on appeal the denial was affirmed by the state's intermediate appellate court. Two questions were certified for review by the New York Court of Appeals, namely: (1) Whether Title II, Article 23 of the Public Health Law is applicable to enjoin a nuisance occurring on premises other than a house of prostitution? (2) Do statute's mandatory closure provisions constitute an impermissible prior restraint? Regarding the first question, the Court held that Art. 23, Title II of the Public Health Law is applicable to enjoin a nuisance occurring on premises other than a house of prostitution if at trial it can be established that there exists a consistent pattern of conduct sufficient to prove that the premises are being em-

ployed for a proscribed use. The court observed that the fact that the defendant's bookstore featured sexually explicit material is "by itself of no relevance, as nothing in Section 2320 supports the application of Title II to a premise based on the content of material sold or displayed there" (A 11).

With respect to the second certified question, the court held that "closure of defendant's bookstore is not essential to the furtherance of the purposes underlying Title II, and is thus an unconstitutional restraint on defendant's First Amendment rights" (A 19). Acknowledging that the Public Health Law nuisance abatement action was not based upon the content or character of the publications sold by the bookstore, but rather upon the documented acts of lewdness and prostitution which had occurred on the premises (A 4), the court nonetheless concluded that, as a bookstore, the defendant must be treated differently under the First Amendment than other commercial establishments not in the business of disseminating printed material. It noted that while a bookstore was not immune from all regulation, "bookstores operating as such may not simply be equated with ordinary nuisances or with personal property subject to forfeiture" (citation omitted) (A 16).

Failing even to address the issue of prior restraint, the court based its determination upon its finding that closure would have an "incidental" effect on the sale of printed matter (A 16). On this basis, it applied the standard established in *United States v. O'Brien*, 391 U.S. 367, determined by this Court to be appropriate for cases involving an abridgement of one's First Amendment rights where expressive conduct is involved.

It is the petitioner's contention that the court below erred both in its determination that under the statute the defendant's First Amendment rights were subject to a prior restraint and in its application of the *O'Brien* test to acts which were neither expressive conduct nor symbolic speech. As a threshold consideration, it is asserted that the case at bar differs from traditional First Amend-

ment cases in that the exercise of First Amendment rights, whether as speech or as expressive conduct, can never bring about imposition of the sanction prescribed by the Public Health Law. It is the prohibited sexual conduct alone, activity entirely distinct from the protected sale of books, which results in the possibility of closure based upon the legislative determination that the continuing occurrence of such acts necessitates a rehabilitation of the premises. Viewed in this vein, it is clear that the statute itself cannot be interpreted as chilling, either directly or indirectly, the exercise of rights guaranteed by the freedom of speech.

In its analysis, the Court of Appeals ignored the crucial consideration that the public health statutes at issue are entirely unrelated to expressive activity, and focused instead upon the effect of the sanction to be imposed if the respondent Cloud Books, Inc. is found guilty of maintaining a nuisance. Concluding that the incidental effect of closure would constitute an impermissible prior restraint on the respondent Cloud Books' First Amendment rights, the court invalidated the application of that provision of the statute to a bookstore. In so doing, the court failed to recognize that many legal sanctions, e.g. imprisonment, probation and closure, inevitably have an incidental effect on the unrestrained exercise of First Amendment rights. However, such incidental effect by itself cannot justify the Court of Appeals' finding that the closure provision of the statute constitutes an impermissible prior restraint nor is it sufficient to trigger the standard of evaluation established in *O'Brien, supra.*[4]

[4] The *O'Brien* rationale was also erroneously applied by the California Superior Court in *People ex rel. Van DeKamp v. American Art Enterprises, Inc.*, 33 Cal. 3d 328 and by the Virginia Supreme Court in *Commonwealth v. Croatan Books, Inc.*, 323 S.E.2d 86. In *Commonwealth ex rel. Lewis v. Allouvill*, 478 A.2d 1334, however, the Pennsylvania Superior Court concluded without reference to *O'Brien* that the closure under review therein did not constitute a prior restraint and did not violate the First Amendment to the Constitution.

A

The Court of Appeals properly noted that "[a]ny system of prior restraints on expression . . . [bears] a heavy presumption against its constitutional validity (*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70)" (A 12). It failed, however, to substantiate its conclusion that closure would, under the facts of this case, constitute a prior restraint. Instead, the court asserted as controlling the general proposition that, "Prior restraints or other restrictions on First Amendment rights may be present not only where a statute directly prohibits expression but also where the impact of a statute curtails the exercise of these rights" (A 16). While this statement may accurately reflect the reach of the prior restraint doctrine, it does nothing to cast light upon its applicability to the instant case.

A finding that the statute at issue imposes an unconstitutional prior restraint must be predicated upon a showing that closure would inhibit in advance the freedom of speech guaranteed by the First Amendment. The essence of the First Amendment is conveyed by the general rule that "there may be no restriction whatever on expressive activity because of its content" (*Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66). As otherwise stated, "above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" (*Police Department of Chicago v. Mosely*, 408 U.S. 92, 95).

In defining the application of this precept, the Court has noted that the First Amendment protects against content-based restriction of protected expression not by forbidding all regulation, but by ensuring that regulation be imposed with "absolute neutrality" (*Young, supra,* at 67) and that there exist other outlets for the expression at issue (*Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76). The absence in the case at bar of any relationship between content and closure, the undeniable neutrality of the imposition of the sanctions mandated by the Public Health Law,

and the absence of any indication that alternate premises suitable for the dissemination of printed materials are not available, collectively establish that closure could cause no impermissible prior restraint on rights protected by the First Amendment.

The closure under consideration, premised upon the occurrence of public sexual behavior, would result despite, not because of, the sale of books and magazines. Significantly the prohibition on activity would restrict the premises at issue such that not only would the defendant be unable to sell his present stock of materials there, but no other person or group would be allowed the use of the building. In its absolute neutrality to the character of the activity to be prohibited, the closure contemplated under the Public Health Law is analogous to similar provisions of fire and safety regulations under which all activity, including that which is constitutionally protected, can be legitimately barred (*Cf. State ex rel. Kidwell v. U.S. Marketing, Inc.*, 631 P. 2d 622, 628).

In addition, there is no indication that the public's right to access to the materials being sold by the respondent would be restrained in any substantial manner. The statute at issue imposes no limitation upon the sale of books and magazines in any location except the one found to be in violation of the health law. The respondent could presumably immediately continue the legitimate aspect of its business across the street from or next door to the premises which it would be forced to vacate.

The circumstances of this case are considerably less restrictive *vis a vis* both the respondent's right to "access to the market" and the public's right to "satisfy its appetite for sexually explicit fare" than the situation presented in *Young, supra*. There this Court determined that even where the regulation in question was imposed as a result of the content of the films to be exhibited, and despite the fact that the "adult motion picture theaters" under licensing consideration were being subjected to a locational restriction which would limit the placement and, inferentially, the

number of such establishments, no impermissible prior restraint on protected communication existed. That content was a consideration in the regulatory scheme imposed did not deter this Court from applying a standard permitting reasonable regulations of the time, place and manner of protected speech. As stated, such regulations are permitted by the First Amendment "where [they] are necessary to further significant governmental interests" (*Young, supra* at 63, n. 18). Based upon its finding that, "viewed as an entity" the market for adult films was "essentially unrestrained" by the ordinances at issue, the Court affirmed their constitutionality. It observed that, "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances" (*Young, supra,* at 62). If the circumstances of *Young,* involving restrictions imposed as a result of the content of materials to be exhibited, do not constitute a prior restraint, then *a fortiori* the circumstances of the instant case, where closure is entirely unrelated to content, cannot.

Importantly, the flaw invalidating the zoning ordinance considered in *Shad, supra,* 452 U.S. 61, does not exist in this case. There the Court determined that the exclusion of all live entertainment in the Borough imposed a substantial burden on protected speech which was not adequately addressed by the justifications articulated by the respondent. In contrast, the closure provisions in the case at bar restrict only the premises found to be in violation of the nuisance law, leaving open to the bookseller unrestricted alternate channels of communication.

The Court of Appeals, in reliance upon *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, discounted the significance of the alternative forums available to the respondent, Cloud Books, Inc. for the sale of its publications, asserting in a footnote:

> "That defendant would still be free to use any other premises to sell books is of little relevance, in part because the

availability and practicality of an alternate site will always be speculative, . . . but more fundamentally because 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place' " (*Southeastern, supra; Schneider, supra) (A 16 n. 8).*

In *Southeastern,* however, where the promoters of a stage production were denied access to municipal facilities, this Court found a prior restraint based on the fact that the town board was empowered to determine whether an applicant should be granted permission to perform on the basis of the board's "review of the content of the proposed production" (*Id.* at 554). Had they been denied because they were the 20th or 200th applicant for a place on a calendar which could accomodate only ten performances, no court would have entertained their claim that they had been victimized by an impermissible prior restraint.

In *Schneider v. State of New Jersey,* 308 U.S. 147, the seminal case relied upon in *Southeastern,* the complaint of this Court was directed toward the fact that the ordinances under review did not merely license distribution of printed materials but rather absolutely prohibited such distribution in the streets which are "natural and proper places for the dissemination of information and opinion (*Schneider, supra* at 163). The focal point for the forum question, as with the other aspects of prior restraint, is thus whether the forum is totally denied or is illegitimately withheld because of the content of the communication at issue.

The Court of Appeals, recognizing that closure of the bookstore would not be based upon the content of the materials sold there, and disregarding that the statute itself does not inhibit dissemination at other locations, nonetheless found that such closure would violate Cloud Books' First Amendment rights. Reflexively stating an unquestioned truism, the court declared, "An ordinance which prohibited all exercise of First Amendment rights in all public areas would be just as unconstitutional as one

barring only expression with some particular content" (A 15). As an initial consideration, an ordinance such as that described by the court would not merely regulate speech, but would prohibit all publicly disseminated protected speech. It is beyond question that the closure at issue in no way would prohibit alternative and unimpeded distribution of bookstore material. Thus, the evaluation of an ordinance prohibiting all public exercise of First Amendment rights is not pertinent to the circumstances presented by the case at bar.

Because the imposition of closure in the instant case would be completely divorced from the content of the materials sold commercially in the bookstore, such closure could have no chilling effect on the respondent's or any other person's exercise of First Amendment rights. While it would hopefully deter others from promoting or countenancing sexual conduct such as that which took place in the booth area of the bookstore herein, it would not inhibit any individual from selling or distributing printed materials.

That the statute does not preclude alternative forums for the circulation of the publications sought to be sold militates against a finding that closure would result in a suppression of ideas.[5] Under these circumstances, the Court of Appeals' determination that the operation of the statute imposed a prior restraint is unsupportable.

B

The improper perspective from which the Court of Appeals viewed the present case has contributed to that court's misapprehension and misapplication of this Court's pronouncements. In determining the unconstitutionality of the Public Health Law's closure provision the Court of Appeals looked to the effect which

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[5] Additionally respondent Cloud Books, Inc. has never asserted the unavailability of alternative locations for the sale of its printed materials nor would it be reasonable to suggest that such alternate locations do not exist in Erie County.

the imposition of mandatory closure would have upon the respondent's business operation. Citing *Shad v. Borough of Mount Ephraim, supra, Young v. American Mini Theaters, supra,* and *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent,* ____U.S.____, 104 S.Ct. 2118, the court concluded that any relocation of the bookstore resulting from closure would incidentally restrict the freedom to disseminate printed material. Upon this basis, the court determined applicable the test outlined in *United States v. O'Brien, supra.* The analysis, while perhaps appealing upon first review, unravels upon closer scrutiny.

The salient facts and circumstances pertinent to this Court's determination of First Amendment issues in the cases cited by the Court of Appeals are manifestly distinguishable from those in the present case. In *O'Brien et al* it was the exercise or intended exercise of rights cognizable under the First Amendment which subjected those asserting such rights to the particular statute or regulation under review.

In *O'Brien* protestor David Paul O'Brien burned his draft registration certificate on the steps of the South Boston Courthouse claiming that the burning was a protected expression against the war and the draft. For his action he was prosecuted under a statute prohibiting the destruction or mutilation of draft registration certificates. In *Shad* the operators of an adult bookstore introduced coin operated mechanisms allowing customers to watch live dancers, usually nude, perform behind a glass panel. The operators were prosecuted for violating a local zoning ordinance prohibiting live entertainment despite their claim that the ordinance violated rights guaranteed by the First Amendment. Theater proprietors in *Young* sought necessary city certificates of occupancy for establishments at which they intended to exhibit assertedly protected adult films. The certificates were denied by city officials on the basis of local ordinances which regulated the location of adult theaters in the community. Supporters of a candidate for election in *City Council v. Vincent* contracted with a

political sign service company to post signs upon utility poles in the City of Los Angeles, California. The political signs were erected by the company and removed by city officials pursuant to an ordinance prohibiting the posting of signs upon public property.

Fundamental to the Court's consideration of the above cases was the claim that protected speech, pure or symbolic, proffered or intended to be proffered, brought into play a restriction inimical to the First Amendment. The posture of the present case stands in stark dissimilarity for the respondents herein do not complain that the exercise or intended exercise of their First Amendment rights works to subject them to the closure provision of the Public Health Law. Indeed it is patent that no legitimate exercise of respondent's right to sell printed materials could ever bring the nuisance law's closure provision to bear against them.

Moreover, there is no contention put forth that the sexual activity alleged to have occurred on the bookstore premises is integral to the bookselling operation and thus constitutionally protected. To the contrary, respondent Cloud Books, Inc. has specifically indicated that the sexual activity is neither necessary to or supported by the bookselling establishment (A 65-A 68). Clearly there exists no causal connection between the respondent's exercise of freedoms under the First Amendment and the closure of the bookstore under the Public Health Law. This absence of causal connection distinguishes the present case from those other decisions of this Court where statutes or regulations have been reviewed because their enforcement had been triggered by an exercise or intended exercise of rights asserted to be protected under the First Amendment.

While not comparable to the scenarios presented by the cases relied upon by the Court of Appeals, the present case is somewhat analogous to situations involving the general application of the penal law to conduct unprotected by the Constitution. Un-

doubtedly incarceration acts as a restriction upon one's right to free speech and association. Yet it could not seriously be contended that such incidental effect upon the rights of those convicted necessitated review of every sentence imposed to determine whether some lesser sanction might accomplish the legislative interest in the control of unlawful conduct.[6] Indeed it is difficult to envision that any court would countenance the application of the *O'Brien* rationale where a prison sentence or fine was imposed upon an individual for conduct unrelated to the First Amendment.

As noted in the irrefutable remarks of the dissent in *California v. LaRue*, 409 U.S. 109, 137-138:

> "Of course it is true that the state may in proper circumstances enact a broad regulatory scheme that incidentally restricts First Amendment rights. For example, if California prohibited the sale of alcohol altogether, I do not mean to suggest that the proprietors of theaters and bookstores would be constitutionally entitled to a special dispensation. But in that event, the classification would not be speech related, and, hence, *could not be rationally perceived as penalizing speech*. Classifications that discriminate against the exercise of constitutional rights *per se* stand on an altogether different footing. They must be supported by a "compelling" governmental purpose and must be carefully examined to insure that the purpose is unrelated to mere hostility to the right being asserted." (emphasis added)

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[6] Cf. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, ___U.S.___, 104 S.Ct. 2839 wherein the dissent, addressing the incidental impact on protected expression which would result from imposition of a ceiling on the fees charged by fundraisers, commented: "But such an indirect and incidental impact on expression is not sufficient to subject such regulation to strict First Amendment scrutiny. Otherwise, national forest legislation would be equally suspect as tending to raise the price and limit the quantity of paper" (*Munson, supra* at 2859).

Similar to the theoretical regulation posed by the dissent above in *LaRue*, the New York legislature has prohibited the operation of any "building, erection, or place," "for the purposes of lewdness, assignation, or prostitution" (Public Health Law § 2320). Furthermore in *LaRue*, the regulation at issue which banned nude dancing where alcohol was sold discriminated on its face against the exercise of First Amendment rights, yet it was held to be valid. In contrast the Public Health Law regulations under consideration in the instant case bear no relationship on their face to the First Amendment. Where the prohibited acts apply to all premises and are completely unrelated to speech, it is inconceivable, as noted above, that "proprietors of theaters and bookstores would be entitled to special dispensation" (*Id.* at 138). In magnifying the impact of respondent Cloud Books' status as a bookseller while at the same time ignoring that the conduct subjecting the bookstore premises to possible closure is unconnected to the freedom of expression, the Court of Appeals has misinterpreted basic constitutional principles.

The irrelevancy of the *O'Brien* rationale to the present case is further demonstrated by the clear language of that decision delineating the circumstances under which the so-called O'Brien test could be employed.

> "This Court has held that when 'speech' and 'nonspeech' elements are *combined in the same course of conduct*, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." (*emphasis added*) (*O'Brien, supra* at 376).

Although acknowledging this prefatory requirement that the test be applied in situations where the communicative and noncommunicative aspects of the "same course of conduct" are subject to governmental regulation, the Court of Appeals proceeded to wholly ignore the necessary pre-condition. Instead it administered the four-pronged test despite that neither the present statute

nor the facts of the case at bar concern the regulation of expressive conduct.

According to the record, the Public Health Law suit brought by the district attorney on behalf of the People of the State of New York sought the control of documented sexual acts occurring on premises open to the general public. The suit also assumed that upon the same premises Cloud Books, Inc. was in the business of selling books, magazines, and periodicals, one of the purposes for which the corporation was formed. It is apparent from the complaint filed that the indiscriminate sexual activity reported therein constituted no form of expression protected under the First Amendment. Further, as noted *infra* at p. 26, respondent Cloud Books has specifically denied that the sexual acts were part of, necessary to, or entwined with its presumptively protected occupation.

By all accounts, it can be determined that two separate and distinct courses of conduct were engaged in on the bookstore premises. One, the ongoing commission of sexual acts, existed independently of the other, the legitimate operation of the bookselling business. This disunion is precisely the circumstance ignored by the Court of Appeals. The sexual activity and the sale of books not being combined in any singular course of conduct, the *O'Brien* test should never have been applied.

Beyond its failure to recognize *O'Brien* as inapposite to the case at bar, the Court of Appeals erred even in its mechanical application of the *O'Brien* test. As observed in *O'Brien*, where a law aimed at the regulation of conduct which includes an expressive element incidentally affects protected expression, it is justified:

> "if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction

> on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" (*Id.* at 377).

The Court of Appeals determined that the abatement of a public nuisance was within the power of the state, that Article 23, Title II, of the Public Health Law furthered an important governmental interest, and that the interest in restricting prostitution and sexual activity in a bookstore is clearly unrelated to the suppression of free expression. The court held, however, that the district attorney had not demonstrated that a means less restrictive than closure, e.g., injunction, would be insufficient to abate the nuisance occurring at the bookstore. Thus, the court concluded, the closure provision of the Public Health Law imposed an unconstitutional limitation on respondent's First Amendment rights.

Notably the case was before the court on appeal from a denial of a motion for summary judgment. As a result of this legal posture, no trial had been held, nor had any sanction been ordered. Notwithstanding the court's conclusion that, "In the present case, there has been no 'less restrictive' relief imposed, nor has the District Attorney demonstrated that the injunctive relief provided for in Title II would be insufficient to abate the nuisance" (A 19), it is submitted that there has been no opportunity for such proof. The district attorney's attempt to obtain a temporary restraining order and subsequently a preliminary injunction to abate the sexual activity was denied. Moreover, the evidence which was before the court, i.e. the information contained in the pleadings filed below, provides support for the contention that a

remedy less restrictive than closure would not be effective.[7] As stated on behalf of the respondent Cloud Books:

> "It is submitted . . . that no such activity [of an autoerotic nature] occurred on the premises, or if they occurred, they merely constituted acts of indiscretion by patrons and were done without the knowledge, either explicit or implied, of any employees or agents of the defendant Cloud Books, Inc. It is further stated that it is firm corporate policy, which is made clearly known to all employees, that if such activity occurs on the premises of the Village Book and News Store, that the patrons are immediately asked to leave and are not allowed to frequent the premises. This corporate policy is strictly enforced and the employees are further informed that any deviation from the policy, or their failure to enforce the same strictly, would lead to the immediate termination of employment." (A 65-A 66).
>
> ". . . no such activities of solicitation [for purposes of prostitution] are allowed to occur or otherwise condoned by any employees, agents, etc. of Cloud Books, Inc. Rather, all employees of Cloud Books, Inc. are informed such that if any activity occurs on the premises of the Village Book & News Store, that they are to request the patron involved to immediately leave the premises and further bar them from re-entry. Furthermore, all employees of Cloud Books, Inc. are informed that any deviation from this corporate policy would lead to immediate termination of employment."(A 66-A 67).

The proof by affidavit that acts of masturbation, fellatio and prostitution were commonplace in the booth area of the bookstore in defiance of the "corporate policy" stated above indicates

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[7] See *Commonwealth v. Croatan Books, Inc.*, 232 S.E.2d 86, 87, wherein the court attempted to fashion a less restrictive remedy than closure to abate the nuisance occurring at an adult bookstore. "The trial court ordered, with the agreement of the parties, that Croatan Books rope off two of the four movie booth access ways, repair any openings between the booths, and hire uniformed guards to prevent loitering in the hallways and use of any booth by more than one patron at a time." Despite these measures, the government was able to demonstrate that such failed to abate the nuisance occasioned by the sexual acts.

the ineffectiveness of any remedy reliant upon either management or employee monitoring of illicit activity. Undeniably, the Court of Appeals' finding that a remedy less restrictive than closure would suffice to further the valid governmental interest in eliminating the sexual activities on the premises was both rash and unjustifiable.

Additionally, with regard to the determination as to whether an incidental restriction on alleged First Amendment freedoms is "no greater than is essential" to the furtherance of an important governmental interest, recent decisions of this Court have indicated that the judgment of the legislature or regulating authority is to be accorded broad respect. In *Clark v. Community for Creative Non-Violence*, ____U.S.____, 104 S.Ct. 3065, this Court rejected the Circuit Court of Appeals' conclusion that the National Park regulation under review was invalid since it did not constitute the least speech-restrictive alternative that could have satisfied the government's interest in preserving park lands. The Court clearly stated:

> "We do not believe, however, that either *United States v. O'Brien* or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." (*Community for Creative Non-Violence, supra* at 3072).

The following term, in *United States v. Albertini*, ____U.S.____, 105 S.Ct. 2897, the Court further clarified the impact of *O'Brien* indicating that governmental regulations are not invalid simply because it may be hypothesized that an alternative, less restrictive on speech, might exist. As the Court observed:

> "Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. . . . The validity of such regulations

does not turn on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests" (*Albertini, supra* at 2907).

It is apparent that the New York Court of Appeals disagreed with the State Legislature's determination that where a public premises, even one being operated as an adult bookstore, countenances random and continuing sexual behavior, a one year closure serves best to abate the health nuisance and rehabilitate the situs.[8] Under the decisions of this Court, such disagreement should not have translated into an invalidation of the closure provision.

C

It bears reemphasis that the closure contemplated herein would occur as a result of conduct totally unrelated to the bookstore's expressive activity. Concededly the imposition of closure would affect the bookstore's right to utilize the premises at issue for future bookselling activity; however, under the circumstances of this case, such closure would operate as no more than a valid time, place or manner restriction on the exercise of First Amendment privileges (*See Community for Creative Non-Violence, supra, City Council v. Vincent, supra*). As enunciated by this Court," [R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant gov-

[8] As originally enacted (N.Y. Laws '14, c. 365), the declaration of a nuisance resulted in a permanent injunction against the nuisance (former Public Health Law § 343-g). A violation of the injunction constituted contempt and was punishable by imprisonment for not less than ten days nor more than twelve months (§ 343-h). Apparently dissatisfied with the efficacy of the remedies, the legislature subsequently amended the statute (N.Y. Laws '27, c. 670) to provide for longer periods of incarceration (§ 343-p), the closure of the premises and the seizure and sale of its fixtures (§ 343-q).

ernmental interest, and that they leave open ample channels for communication of the information" (*Community for Creative Non-Violence, supra* at 3069).

The clear purpose of the closure statute, i.e. to limit the spread of sexually transmitted diseases and to rehabilitate a premises characterized by continuing, indiscriminate sexual behavior, is unrelated to any First Amendment interest. Not only is the statute silent on its face regarding speech or speech related conduct, but it is neutral in its application to all premises housing the proscribed nuisance activities. Indeed by immunizing bookstores, based upon status alone, the Court of Appeals has undercut the intended neutrality of the statutes (*City Council v. Vincent, supra* at 2135). The inequity of allowing a bookstore used for purposes of prostitution to remain open while mandating closure of an automobile dealership or drugstore used for the same purpose cannot be justified by reference to the First Amendment. Such discriminatory application would in no way promote the purposes of that constitutional protection but rather would encourage violators to engage in the sale of books as a protection against the legal consequences of prostitution related activities.

As expressed above, the legislature has determined that its interest in abating a nuisance such as described herein is most efficiently accomplished by a one year closure. It is beyond dispute that the remedy selected would eliminate or abate the nuisance to which it is directed for at least the period during which the closure is in force. The legislature's further determination that said time period should be adequate to ensure that the pre-existing use pattern would be broken, thereby permitting rehabilitation of the premises, cannot logically be assailed as unreasonable. Contrary to the regulations deemed improper in *Secretary of State of Maryland v. Munson,* ____U.S.____, 104 S.Ct. 2839, the statutes under consideration prohibit a "core of easily identifiable and constitutionally proscribable conduct" (*Id.* at 2852) by using

means that are precisely chosen to accomplish the state's objectives (*Id.* at 2853).

Respondent Cloud Books' primary contention, i.e that a less restrictive means could and should be used to accomplish the desired end of nuisance abatement, is refuted in two respects. First, this Court has confirmed that:

> "[R]egulations that burden speech incidentally or control the time, place, and manner of expression . . . must be evaluated in terms of their general effect. Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, ____U.S.____, 105 S Ct. 2897, 2907.

Where, as here, the Public Health Law statutes do not chill the exercise of First Amendment rights, a remedy less restrictive than closure, even if effective to abate the nuisance, is not required.

Secondly, neither the respondents nor the Court of Appeals have substantiated their claim that a less restrictive remedy would in fact be successful to meet legislative goals. In *Commonwealth v. Croatan Books, Inc.*, 323 S.E.2d 86, the court attempted to fashion a remedy other than closure to abate a similar nuisance occurring in an adult bookstore, but failed.[9] As mentioned above, the proprietors of Cloud Books have indicated in their motion for summary judgment that they do not encourage or permit the occurrence of illicit sexual activity on their premises. It can be anticipated, therefore, that an injunction ordering them to stop all such activity might not be effective.

Since the limitation under consideration would apply only to the one premises asserted to be used in violation of the health law, respondent cannot be heard to protest that all channels for communication would be made unavailable. Significantly, the court below did not determine that respondents would be denied substantial access to alternative forums but rather the court found that any restriction upon the respondents as to place could result

[9] *See supra*, n. 6.

in an impermissible prior restraint (A 16).

Because the health regulation under scrutiny does no more than establish a limited and reasonable regulation on the place of the respondent's sale of publications, without regard to their content, it must be seen to operate as a valid restriction. Under these circumstances, the state's interest in abating the health nuisance presented by the conduct occurring on the premises adequately justifies the closure provision under review.

D

The fact that the premises contemplated for closure was utilized in part for the dissemination of printed materials should not work to immunize such premises from the long recognized right of communities to eradicate existing health nuisances through meaningful and effective sanctions (*Miller v. Schoene*, 276 U.S. 272, 279-280; *Grosfield v. United States*, 276 U.S. 494; *Murphy v. United States*, 272 U.S. 630; *Mugler v. Kansas*, 123 U.S. 623). To be sure, such privilege or exemption would operate as an invitation to those responsible for the creation and maintenance of public nuisances to defy the attempts of legislative bodies to control offensive conditions in the most efficient manner.

Because the court inexplicably equated the concept of prior restraint with that of incidental effect, its ruling will assuredly give rise to the assertion of a "prior restraint" defense in closure actions against unscrupulous individuals who will undoubtedly seek to fashion the circumstances and conditions of their operations so as to deftly establish a colorable claim under the First Amendment. Unquestionably the decision of the Court of Appeals will give rise to at least the temptation for sex-shop operators to devote a portion of their premises to ostensible First Amendment activity to ward off court ordered closure. This is certainly not to say that the First Amendment is to be ignored whenever the government has a legitimate interest in regulating particular conditions or conduct but rather that the law's safe-

guards be employed to protect speech and the exchange of ideas rather than offensive sexual activity having no bearing upon the messages sought to be promulgated.

The *de facto* immunity created and conferred by the New York Court of Appeals in the present case clearly works to eviscerate the community protections provided by public nuisance statutes. It also risks a perversion of the First Amendment whereby the might of the law becomes the shield of the lawless. Neither the Constitution nor the decisions of this Court require that such anomaly be allowed to exist.

CONCLUSION

THE JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

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RESPONDENT'S

BRIEF

85-437

In The

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD J. ARCARA, District Attorney of Erie County,
Petitioner,

vs.

CLOUD BOOKS, INC., etc., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

May not the State of New York authoritatively construe its state statute as requiring that an injunction against illegal acts be obtained prior to an order of closure where the record before it does not substantiate the claimed need for closure, and where the imposition of injunctive relief would satisfy both the rights of the State and the First Amendment rights of the respondents as guaranteed under the State and Federal Constitutions.

TABLE OF AUTHORITIES

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ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

The Village Book and News Store is an adult bookstore located in the Village of Kenmore, New York and engaged in the sale of sexually explicit adult magazines, novelties and movies. While these materials do have sexuality as their primary subject matter, they are not obscene and no claim to the contrary has been made.

The bookstore has been in operation at its present address since 1979. Since that time it has been subjected to an onslaught of local ordinances and lawsuits designed to close its doors. The litigation underlying this case was commenced on October 1, 1982 under

the New York Public Health Law provisions providing for the enjoining and abatement of houses of prostitution. The District Attorney of Erie County maintained in his legal papers that the bookstore itself was a public nuisance which must be ordered closed.

The allegations which preceded the litigation consisted of statements by an undercover police officer made during a 19-day investigation in 1982 that acts of untoward sexuality, of masturbation and sexual solicitation were occurring on the premises. There has been no documented claim of illegality since that time.

Despite the very limited nature of the duration of the criminality alleged and its occurrence in the now rather removed past, the District Attorney argues that the nuisance cannot be abated by any measure other than the closure of the bookstore for a one year period as provided for in Section 2330 of the Public Health Law*. His bid for closure was, however, rejected by the New York Court of Appeals which ruled that, on the record before it, closure would constitute a prior restraint and violate the principles of free expression flowing from the First Amendment and Article I, Section 8 of the New York Constitution. Moreover, the Court continued, closure was also inconsistent with the contours of the very statutory provisions which the District Attorney sought to enlist. The Court construed the subject article of the Public Health Law as initially authorizing an injunction against the nuisance — the acts of illegality — which would not necessarily entail closure. Should that prove unavailing to afford the necessary relief the Court noted that closure could then be effected but not, given the facts before it, before the less restrictive remedy had been attempted.

* The one year closure provision of the statute *may* be cancelled but only if certain conditions are met. These necessitate that the owner (not the lessee as is the respondent herein) post bond. As the Court of Appeals noted, any relief for the lessee is thus encumbent upon the discretion of the owner (A-12).

The correctness of that determination is now under review by this Court.

SUMMARY OF THE ARGUMENT

A crucial facet of the respondents' argument is its position that the decision of the New York Court of Appeals is an eminently reasonable one, designed to meet the needs and aims of both the prosecutor and the Village Book and News Store. In ruling that closure could not be justified if it had not been preceded by an injunction ordering an end to the illegality, the Court did not hold that closure was *never* appropriate. It held that "under these circumstances" (A-19) closure was a premature solution to ills which were controllable by less drastic measures.

The conservative nature of the ruling renders the claim of the petitioner and the City of New York, writing as amicus curiae, suspect. There is a cry of unfounded panic — they come to the Court declaring that New York State has now immunized bookstores from the control of illegality, that First Amendment precedent has been interpreted as permitting an exception for adult bookstores. They claim that with this decision every purveyor of prostitution is free to open his doors as long as he secures a bookshelf to the front of the brothel, thereby claiming the exemption from law and order which has been sanctioned by the Court.

The reply of the Village Book and News to these fevered prosecutorial imaginings is simply that they are unmerited and detract from the record and the legal precedent involved. Respondents maintain that the closure of the bookstore, when less restrictive relief is available and has yet to be tried, constitutes a prior restraint violative of the First Amendment and Article I, Section 8 of the New York Constitution. While respondents do not argue that a state must employ some hypothetical, "least restrictive means" of controlling criminal activity, they do posit that the

POINT

THE COURT OF APPEALS WAS CORRECT IN ITS DETERMINATION THAT, ON THE RECORD BEFORE IT, AN ORDER OF CLOSURE WAS AN UNNECESSARY AND CONSTITUTIONALLY OVERBROAD METHOD OF ABATING THE NUISANCE ALLEGED.

The New York Court of Appeals has determined that the closure of the Kenmore Village Book and News Store, pursuant to New York Public Health Law § 2320 et seq. would entail an unconstitutional restraint on the right of the store and its patrons to disseminate and purchase sexually explicit but non-obscene material. The Court ruled that, upon the facts of the record before it, which established that no less restrictive a measure than a one year closure had been attempted or employed to combat the alleged illegality, an abatement injunction was an overly broad remedy inconsistent with the constitutional requirement that incidental restrictions on free speech be narrowly tailored.

In attempting to have that determination reversed, the District Attorney of Erie County, Richard J. Arcara, asks this Court to recognize that the remedy requested is allegedly not sought because the premises involved is an adult bookstore. Indeed, the State concedes that the Village Book and News is a legitimate business which is engaged in the constitutionally protected activity of dissemination of non-obscene books and magazines (Petitioner's Brief, page 10-11). It argues that closure is necessitated *despite* the fact that the site houses a bookstore, not because of it.

It is this essential fact, according to the District Attorney, which legitimizes application of the statute. Because closure is not predicated upon content the State maintains that it is free to apply whatever law or statute exists in New York for control of a nuisance. Buttressing that argument is the District Attorney's un-

prosecutor should be required to activate a statutory injunction, as opposed to closure, when the societal ill sought to be eradicated can be controlled by the same. They argue further that the prosecutor's opposition to that remedy bespeaks his actual desire to control and suppress, not crime, but non-obscene material which enjoys the protection of the First Amendment. If the petitioner were as protective of the content at issue as he claims in page after page of his brief, then the justification for any opposition to the ruling of the Court of Appeals is inconceivable. His protestation that nothing less than closure can even be attempted belies his wish to suppress content, is overbroad and unnecessary given the few acts of criminality said to have occurred four (4) years ago and is violative of the right of the respondents to engage in the constitutionally protected sale and dissemination of non-obscene materials.

Finally, the respondents respectfully ask the Court to recognize how spurious are the claims of the petitioner and amicus curiae that the decision under review adversely affects the quality of life in precluding the closure of adult bookstores. The Court of Appeals ruling, in its faithfulness to preservation of the goals of law enforcement and the claims of the First Amendment has not shielded illegality, it has only shaped the remedy to the nuisance itself. By its action, the Court has truly acted to preserve the quality of life which finds expression not only in crime-free streets but also in communities where the constitution subtly but inexorably molds the life of its residents. When the Courts fail to so apply constitutional principles to our daily lives, then we may be heard to complain that our quality of life has suffered.

supported claim that the premises, even if closed, can locate elsewhere within the Village of Kenmore. The facial neutrality of the statute, the absence of any relationship between content and closure and the assumption that alternate locations are available negate any possibility that a prior restraint will characterize an order of abatement and closure.

To these arguments, the respondents reply that they not only misinterpret the teachings of the Supreme Court but also present an obscured factual picture which distorts the reality of the circumstances. This case *is* about content and it reflects the persistent efforts of the District Attorney to close an adult bookstore, to utilize a statute which has traditionally been directed to the brothel, to enjoin the operation of a business and not merely the illegal acts alleged therein. Since nothing less onerous than closure has been sought, the implicit assumption that content control is involved is a valid one, significant to the issues presented at bar.

The petitioner also incorrectly states that the Village Book and News Store is free to relocate its business. In fact, virtually the only business location available to the bookstore is its present site, a fact which also is of import to the discussion below. Finally, even if this Court should ultimately conclude that content control is but an incidental effect of closure and that sufficient alternate resources exist for the dissemination of adult fare (despite the absence of factual support in this record), respondents maintain that the remedy of a one year closure must nonetheless be held repugnant to the First Amendment and Article I §8 of the New York Constitution, requiring, as this Court has consistently reiterated, narrowly tailored regulation designed to effectuate a substantial state interest.

A. CONTENT CONTROL AND ITS RAMIFICATIONS

The Village Book and News Store is located in the Village of Kenmore, which abuts the Buffalo city line. The store has been in operation at its present address since September, 1979, and it sells materials of a sexually oriented nature. Books, magazines and novelties are sold and the premises contains a number of coin-operated movie machines which also show explicit sexual matter (A-24).

In this action, commenced on October 1, 1982, the District Attorney seeks an order which would close the Village Book and News Store for one (1) year, pursuant to New York Public Health Law § 2330. The action had its inception in a purported investigation of the business conducted by an undercover police officer from September 13, 1982, until October 1, 1982 (A-55-60). The complaint alleges the commission of various lewd acts said to have been committed by unidentified patrons of the store and witnessed by the undercover officer. Among those acts charged are instances of masturbation, fellatio and sexual solicitation (A-55-59).

It is on the basis of this 19-day investigation occurring almost four (4) years ago that the District Attorney argues that the premises itself is an uncontrollable nuisance which cannot be abated by any remedy short of complete closure for no less than one year. Despite the claim, there have been no arrests made since the inception of the lawsuit nor have any other reports of illegality issued forth. Nonetheless, the District Attorney seeks to convince and stands ready to announce to this Court that the nature of the premises is irrelevant to the legal action initiated.

The respondents are well aware that they may not present facts for the Court's review which are not contained within the record. The Court can, however, take judicial notice of general facts and further, of the history of related cases involving the same parties.

See, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 157 (1969). In *Shuttlesworth*, *Id.*, the Court stated, moreover, that "in assessing the constitutional claims of the petitioner '[i]t is less than realistic to ignore the surrounding relevant circumstances' " (*Id.* at 156-157).

Given that indication, the respondents respectfully ask that the Court take cognizance of facts which, while admittedly are not on the record, are reported in newspaper articles which are attached in a separate appendix to this brief.[1]

Those articles refute the District Attorney's disingenuous claim that the nature of the premises in question is totally divorced from this lawsuit. Respondents very reluctantly bring these matters to the Court's attention and do so only under the constraint of having to clarify what it sincerely believes is the deliberately distorted portrayal of the issues by the petitioner.

Much of the controversy surrounding the 1979 opening of the Village Book and News Store was fueled by a group calling itself the "Concerned Citizens of Kenmore," a group which announced as its goal the removal of "an adult bookstore from their village" (RA 3).[2] The Concerned Citizens were extremely vocal politically and sought to enlist the aid of local lawmakers and prosecu-

[1] Should the Court determine that it cannot consider these articles or the facts surrounding the filing of the instant lawsuit, respondents ask in the alternative, that this case be remanded to state court for the presentation of supplemental facts which would permit a more accurate resolution of the constitutional issues, particularly in view of petitioner's erroneous claim that no complaint regarding the lack of alternate locations has been made by the respondents (Petitioner's Brief p.19). See, *Giles v. Maryland*, 386 U.S. 66, 74, 80 (1967).

[2] Numbers in parentheses preceded by "RA" refer to page numbers in Respondent's Appendix.

tors in ridding the village of this type of adult entertainment (RA 7). They wrote that their community of Kenmore, New York, was typical but for one fact:

> "our community has been singled out as one of the first locations to have a 24-hour, 7-days-a-week pornography operation replete with 24 'peep shows,' open displays of sexual devices and explicitly salacious magazines" (RA 7).

Undoubtedly, the concern of the citizens of Kenmore was the adult materials on display. And, local law enforcement officials were responsive to their outcry. Besides the Village of Kenmore's enactment of new and stringent zoning ordinances and fire codes (RA 1, 2, 69) the Erie County District Attorney's Office also sought to force the Village Book and News out of business. In 1981, it initiated a civil lawsuit which requested not only an injunction against the sale of 14 named publications but also an order halting the sale of all future obscene periodicals. See, *Cosgrove v. Cloud Books, Inc.*, 83 A.D.2d 789 (4th Dept. 1981). The then-District Attorney of Erie County, Edward C. Cosgrove, announced that the lawsuit would "accelerate" proceedings in the controversy over the bookstore (RA 11). The prosecutor's bid to enforce an unadulterated prior restraint was rejected by the New York appellate court.

Undeterred, both the District Attorney and the Concerned Citizens for Kenmore continued their efforts, conducting the two-month undercover investigation which culminated in the nuisance lawsuit before this Court. That investigation was prompted by the citizen's group which again was reported, as is local common knowledge, to have as its aim closure of the bookstore's doors (RA 3). The history of the Village Book and News clearly reveals that the nuisance is and has been deemed the store, not because of the alleged sexual acts occurring there but because Kenmore citizens want the store out of their community. For Mr. Arcara to argue otherwise before this Court is, at best, misleading, most par-

ticularly when the State's legal arguments hinge on their repeated disavowals of unconstitutional intention.

B. ALTERNATE SITES AND THEIR VIABILITY

There is a second misstatement of fact in the District Attorney's brief, equally germane to analysis of the constitutional questions present. In arguing that the State's actions demand only the slightest judicial scrutiny, if any, the District Attorney points to the absence of content control and, as well, the claim that the Village Book and News Store, if closed, could simply reopen across the street (Petitioner's Brief, page 16).

The District Attorney chooses to ignore the zoning ordinances of the Village of Kenmore which limit the presence of adult uses (which category includes adult book stores) to one small unpopulated and industrialized area on the outskirts of the residential/business district of the village (RA 69). The passage of this ordinance in December, 1979, only two (2) months after the opening of the Village Book and News (RA 69) was followed by the passage of Kenmore Local Law No. 5 which established rigorous licensing requirements for those desirous of operating controlled amusement and vending devices within the Village of Kenmore (RA 81). In addition, the village also passed new building and fire code ordinances and altered the necessary licensing requirements applicable to the Village Book and News. The respondents' alleged, in an action for declaratory and injunctive relief, that these various municipal laws had, in a manner violative of the State and Federal Constitutions, effectively forced it out of business (Meyers Affidavit, RA 96). A stipulation of discontinuance was agreed upon, providing that the bookstore could remain at its present location and further, that, while at that location it would be exempted from all but specified provisions of the newly passed game room and licensing ordinances (RA 94).

In view of that history, the Village Book and News Store, if ordered closed, would not be able to simply reopen across the street or next door to its premises. Because of this earlier round of litigation (again, the result of the business' unpopularity, most certainly) the respondents have no option but to remain at their present location.

Given its repercussion on the question of the constitutionality of closure, respondents respectfully ask the Court to take judicial notice of this prior litigation which demonstrates a concession by Village of Kenmore officials as to the unavailability of other locations.

C. CLOSURE OF THE BOOKSTORE REPRESENTS AN OVERLY BROAD RESTRICTION ON FREE SPEECH[3]

The appellants rightfully remind the Court, "government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92, 95 (1972). If, as respondents submit, closure of the bookstore is actually predicated on the wish to suppress the unpopular but non-obscene materials sold at the site,

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[3] Although ultimately utilizing a balancing test to weigh competing claims, the Court below also recognized that an unconstitutional prior restraint is effected when blanket closure is the result of a showing that some obscene material was sold or exhibited on the premises or in this case, where some other alleged illegal activity occurred. Respondents argued for and agree with that finding and ask this Court to recognize the applicability of those several cases ruling that the fact that some past crime was committed (the sale of obscene material) does not provide a constitutional basis for closure. See, e.g. *General Corporation v. State, ex rel. Sweeton*, 294 Ala. 657, 320 So. 2d 668 (1975), *cert. den'd.* 425 U.S. 904 (1976); *People ex rel. Busch v. Projection Room Theatre*, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P.2d 600 (1976), *cert. den'd.* 429 U.S. 922 (1976); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1976); *State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976).

then closure cannot be countenanced under the First Amendment. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

Even assuming, however, that application of the pertinent Public Health Law Provisions is unmotivated by the desire to suppress a controversial point of view, the District Attorney is still incorrect in his contention that judicial review of the effect of closure is all but nonexistent. He errs in assuming that the kind of balancing test articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), is applicable only if a "pre-condition" is met, that being the requirement that both speech and non-speech elements be combined in a single course of conduct (Petitioner's Brief, page 23).

The cases of this Court undercut the argument that the *O'Brien* standard is of such limited application and its corollary that the government will be subject to no judicial review if the conduct it seeks to regulate is not an integral part of the free expression which it so detrimentally affects. In fact, it was very recently that the Court equated the *O'Brien* test with judicial assessment of time, place and manner restrictions on First Amendment activities, restrictions which are valid even if they directly limit oral or written expression. See, *Clark v. Community for Creative Non-Violence*, ____U.S.____, 104 S.Ct. 3065, 3071 (1984). The exalted position of free speech does not foreclose government from placing *reasonable* time, place and manner restrictions on the exercise of that speech. Similarly, the government may achieve its interests by regulation which is *narrowly* drawn. *Clark, Id.*, at 3069.

The Court's recent recognition that the *O'Brien* test is virtually indistinguishable from the time, place and manner standard had

found voice in earlier cases applying *O'Brien* to a variety of situations, not just those where speech and non-speech elements were combined, but where the incidental *effect* of government regulation was to prohibit First Amendment expression.

In *Procunier v. Martinez*, 416 U.S. 396 (1974), prison inmates of the California Department of Corrections challenged the Department's regulations permitting censorship of prison mail. While the State justified its action on the need to maintain prison security and order the Court adopted the balancing approach inherent in the rulings of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *Healy v. James*, 408 U.S. 169 (1972), and *United States v. O'Brien, supra*. Although recognizing that those cases were not directly controlling the Court said:

> "In broader terms, however, these precedents involved incidental restrictions on First Amendment liberties by governmental action in furtherance of legitimate and substantial state interest other than suppression of expression" (*Id.* at 411-412).

Indeed, rather than limit the applicability of *United States v. O'Brien*, the Court has concluded that it provides "the appropriate framework for reviewing a viewpoint neutral regulation." *Members of City Council v. Taxpayers for Vincent*, ____U.S.____, 1045 S.Ct. 2118, 2129 (1984).

Thus, even crediting the State's protestations that its action is divorced from any attempt to stifle content, the Court must still analyze and apply *O'Brien* and its determination that:

> "a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to

the furtherance of that interest" (*United States v. O'Brien, supra*, 391 U.S. at 377).

That an incidental restriction on expression may yet be unconstitutional if overly broad is evidence that a prior restraint involves more than content censorship or denial of an alternate forum for the exercise of First Amendment freedoms (Petitioner's Brief, page 9)[4]. "Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, fn. 7 (1981). This judicial scrutiny has repeatedly required the Court to examine the effect of legislation, not merely the motivation behind it. See *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (Court must examine effect of challenged legislation); *Healy v. James, supra*, (effect of action was a form of prior restraint).

Nor do those cases cited by the petitioner stand for the proposition that judicial scrutiny will be abandoned if legislative intent is honorable. Instead, they actually serve to highlight the truly drastic nature of the action sought and the amorphous quality of the governmental interest asserted.

For instance, it is true that in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), the Court validated municipal ordinances providing that an adult theatre not be located within 1000 feet of any two (2) other regulated uses or within 500 feet of a residential area. Because these restrictions were applicable or not depending upon the type of message expressed the District Attorney deduces that "a fortiori" no prior restraint can be found in this case where "closure is entirely unrelated to content" (Petitioner's Brief, page 17).

[4] "The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, fn. 3 (1942).

That conclusion is as overbroad an interpretation as closure is drastic a remedy. Although the ordinances in *Young* were upheld and although the Court recognized that the restriction was directed to the type of movie, the ruling was made upon consideration of two (2) significant factors ignored by the petitioner herein. First, the record in *Young* provided the statistical base for the conclusion that a concentration of adult theatres in one area caused it to deteriorate rapidly (*Id.* at 71-72). Secondly, and particularly apropos here, the Court noted that only the location of *prospective* adult theatres was to be affected, not those already in operation. The Court stated that "what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited." (*Id.* at 71).

In view of the facts established in *Young*, the District Attorney's conclusion that if content restrictions can be justified, non-content oriented closure must be legitimate, is inaccurate and imprecise. In fact, the Court's concern in *Young* that no pre-existing theatres even be relocated (much less closed) reflects the limited nature of the *Young* ruling,[5] and serves to remind that the Court has been consistent in its disapproval of overly broad remedies, whether or not directed towards point of view.

The District Attorney places similar reliance upon *California v. LaRue*, 409 U.S. 109 (1972), where the Court held valid a regulation prohibiting nude dancing on premises where alcohol was sold. As with *Young*, petitioner herein concludes that if the regu-

[5] See, also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) where *Young* was held not to stand in support of the validity of a zoning ordinance prohibiting live entertainment in the borough. The Court repeated that *Young*, unlike *Schad*, " *'imposed a minimal burden on protected speech'* " (*Schad, Id.* at 71).

lation directed at conte[illegible] was ruled constitutional, then per force his attempt to enforce a s[illegible]tute unrelated to the First Amendment is likewise justifiable. Again, however, the petitioner fails to give necessary weight to the facts of the record. In *LaRue*, as this Court also explained in *Schad*, *supra*, the ruling relied extensively on the broad power accorded the State under the Twenty-first Amendment. *Schad*, 452 U.S. at 74, fn.15.

The failure of the petitioner to give due deference to the circumstances at issue also causes him to misapply the ruling of *Schad v. Borough of Mount Ephraim*, *supra*, which he cites as distinguishable since in *Schad* adequate outlets for expression were foreclosed by the Borough's zoning plan. The same deficiency holds true in this case, however. As discussed, the Village Book and News Store is denied relocation by virtue of Kenmore's zoning ordinances and the legal stipulation, exempting it from licensing and game room ordinance provisions on condition that it remain at its present location. Therefore, there are not open to the respondents the "unrestrained, alternate channels of communication" which the District Attorney imagines (Petitioner's Brief, page 17).

The instant matter is comparable to *Schad* where the zoning law was invalidated since, by prohibiting live entertainment within the Borough, too substantial a burden had been imposed on protected speech. That burden was not adequately relieved by the fact that live entertainment was readily available in "close-by areas outside the limits of the Borough" (*Id.* at 76).

Beyond the fact that this case should not turn upon the petitioner's speculation (since it is he who bears the burden of disproving a prior restraint (*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 [1963]), is the relevant statistic that Erie County is 1028 square miles. Neither the bookstore owners nor those who patronize the store should be forced to run their business and pursue their interests miles from the original site of operations. The Court has ex-

plicitly rejected the right of a locality to "zone out" constitutionally protected expression, even if available in neighboring areas:

> "It would be a substantial step beyond *Mini Theatres* to conclude that a town or county may legislatively prevent its citizens from engaging in or having access to forms of protected expression that are incompatible with its majority's conception of the 'decent life' solely because these activities are sufficiently available in other locales" (*Schad*, *Id.* at 78, concurring opinion of Blackmun, J.).

D. THE STATE CONSTITUTIONAL BASIS FOR THE RULING OF THE COURT OF APPEALS

Despite the substantial body of precedent indicating that the effect of legislation will be studied and the governmental interest weighed against the precision with which the regulations are drawn, petitioner relies on two recent cases which it deems supportive of its laissez-faire construct. The respondents submit that the rulings of *United States v. Albertini*, ___U.S.___, 105 S.Ct. 2897 (1985) and *Clark v. Community for Non-Violence*, ___U.S.___, 104 S.Ct. 3065 (1984) are distinguishable based on the nature of the legislation at issue and, as always, the circumstances peculiar to those cases. The contrast between the holdings and the situation herein will be discussed below. Initial attention, however, must be given to the narrow rendering of *O'Brien* which petitioner argues inheres in the language of *Clark* and *Albertini* and its impact upon the matter under review.

In *United States v. Albertini* it was said that an incidental burden on speech is permissible under *United States v. O'Brien*, *supra*, "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation" (*Id.* at ___U.S.___, 105 S.Ct. 2907). Should that language be read as validating the District Attorney's attempt to utilize any remedy it wishes, whatever its effect, as long as the state allegedly eschews any attempt to stifle content, it has been

directly rejected by the New York Court of Appeals under Article I, Section 8 of the New York Constitution. The protection afforded the right of free expression under that provision of the State Constitution is undeniably as broad and possibly broader than that secured by the First Amendment. *See, Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *People v. Ferber*, 57 N.Y.2d 276 (1982). The decision of the Court of Appeals reflects its understanding that the State Constitution, if not that of the Federal Government, measures the means of reaching the substantial state interest as well as the justification for the goal itself.

It was upon that formulation that the Court of Appeals held that, regardless of the state's articulated reason for seeking closure of the bookstore, the constitutionality of the action was to be judged by reference to the state test formulated in *Nicholson v. State Commission on Judicial Conduct*, 50 N.Y.2d 597, 607 (1980). There, the Court held that:

> "'[a] proper analysis calls for examination of the degree of interference with the First Amendment interest, the strength of the governmental interest justifying the restriction and the means chosen to prevent the asserted evil'" (A-161).

The Court pronounced that test similar to the *United States v. O'Brien* standard but unquestionably did so on the assumption that *O'Brien* necessitated strict compliance with its fourth prong, that requiring that the restriction on First Amendment freedoms be no greater than essential to the furtherance of the government's interest. Because the Court concluded, on the record before it, that the interest in preventing illegal activity could be served by means which would not affect First Amendment rights, its ruling cannot be given due deference by this Court under the State Constitution, if not the First Amendment.

E. THE STATE'S STATUTORY INTERPRETATION

The extremely limited nature of the decision of the Court below has been discounted by the Petitioner and Amicus for the City of New York, apparently because recognition of the case's boundaries would render superfluous the parade of horrors with which both attempt to shore their legal arguments. Despite their efforts to convince otherwise, the Court of Appeals did not hold that closure could never result from application of the statute, in this case or any other. Rather, it ruled that, on the record before it and under the circumstances detailed, a remedy less far reaching than closure was available, appropriate and accommodating to prosecutorial and defense interests alike (A-191).*

In so finding, the Court of Appeals ruled that while the state may authorize legislation aimed at abating a public nuisance — in this case, Article 23, Title II of the Public Health Law — its abatement of the nuisance should be only as broad as the evil sought to be eradicated. The Court, therefore, interpreted the statute as providing a two-tiered level of control, the first level consisting of the imposition of an injunction directed at the bookstore which would order enjoined the alleged instances of illicit and criminal sexuality. Finding that this less drastic measure had not even been attempted by the District Attorney, much less proven futile, the Court held that its imposition at least on this record must precede any order of closure.

In determining that the statute at hand contained provision for a permissive closure order, to be applied if necessitated by recalcitrant violators of the law, the Court of Appeals did nothing more radical than authoritatively construe its own state's statute. Its

* The Court's holding is but a reflection of the general maxim that, in an abatement of a nuisance, the relief should not exceed that which is necessary to achieve the end. See, e.g., *Hunt v. Easley*, 197 S.W.2d 703 (Mo. App. 1973); *Township of Lacey v. Mohr*, 119 N.J. Super. 135, 290 A.2d 450 (App. Div. 1972); *People v. Mason*, 124 Cal. App. 3d 388, 177 Cal. Rptr. 284 (1981).

action must be respected. The well-established rule is that the interpretation of the statute by the state's highest Court "becomes a part of the statute as definitely as if it had been so amended by the Legislature." *Winters v. People of the State of New York*, 333 U.S. 507, 514 (1948); See, also *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495, 499-500 (1947). Deference to the state's construction of its legislation must be accorded when that construction is posited in order to give effect to the state's own constitution.

The Court of Appeals' holding, providing that the pertinent statute forecees employment of an injunction prior to closure, does no disservice to the ability and desire of prosecutors to control illegal activity in a bookstore or wherever it may arise. The Court has done nothing to shield illegality or immunize bookstores or to pave the way for bogus operations merely fronting what are, in effect, houses of prostitution. The outcry voiced by the District Attorney of Erie County and the City of New York is an unfounded attempt to sway the Court with histrionics rather than fact and law.

It must be reiterated that the holding below does not foreclose the bookstore's demise should that ultimately prove necessary as it did in *Commonwealth v. Croatan Books, Inc.*, 228 Va. 305, 323 S.E.2d 70 (1984), a case which the Court of Appeals cited with approval, stating explicitly that it concurred in the *Croatan* decision (A-181). The Court's recognition, by citation to *Croatan*,

Similarly irrational is the prosecutorial argument that no constitutional complaint could arise were the store closed because of the incarceration of the owner. Certainly locking up the owner is not the same as padlocking his store. Moreover his failure to pay taxes or comply with zoning requirements is as well not parallel to the situation here since the payment of tax arrears and the compliance with any kind of municipal ordinance would prevent closure and would also constitute the narrowest means of curing the defect. Not so in this case, where the intermediate and less restrictive step of injunctive relief is in the District Attorney's view discounted.

among other indications, that closure might be appropriate upon a proper record of facts, undercuts the petitioner's argument that the Court of Appeals has ruled that closure may never be employed.

It is of some note, moreover, that the subject bookstore in *Croatan* had 100 film booths, seven more than the handful of such devices installed in the Village Book and News. In fact, the petitioner's citation to *Croatan Books* as indicative that injunctive relief is ineffective, illustrates the basic weakness of its argument. That an injunction proved unavailing in *Croatan*, with its 100 movie booths, hardly bodes ill for its success in this case. Such a speculative basis for demanding closure of an ongoing business highlights the illusory nature of the need. It reaffirms, too, that the prosecutor's desire to impose the over-broad remedy is not based upon valid aims but rather upon the suppression of a controversial content.

Equally unconvincing is the District Attorney's argument that it has already attempted to obtain an injunction and was denied. It maintains that its inability presages its future lack of success which, in turn, underscores the need for closure. What the District Attorney does not seem to distinguish, however, is that the injunction sought was a preliminary injunction, the necessity of which it was not able to establish as a matter of law (A-131). Imposition of permanent relief does not depend upon the grant of a preliminary injunction and does not bolster the argument proffered. Thus, there is no impediment to the District Attorney's ability to obtain a permanent injunction if he is able to carry his burden of proof at a trial on the merits. In fact, his stated opposition to an injunction is the retort that it "might not be effective" (Petitioner's Brief, p. 30), a vague supposition which is of no legal or evidentiary value when one considers that the First Amendment is at stake.

The two-step process derived from the Public Health Law legislation serves to conclusively distinguish this case from *Clark v. Community for Non-Violence*, ___U.S.___, 104 S.Ct. 3065 (1984) and *United States v. Albertini*, ___U.S.___, 105 S.Ct. 2897 (1985) cited for the proposition that, even if *O'Brien* is applicable, it insulates legislation from scrutiny if no intent to censor content can be discerned.

In *Clark v. Community for Creative Non-Violence*, ___U.S.___, 104 S.Ct. 3065 (1984), the Court reiterated that:

> "restrictions of this kind [reasonable time, place, and manner] are valid provided that they are justified without reference to the content of the regulated speech, *that they are narrowly tailored to serve a significant governmental interest* and that they leave open ample alternative channels for communication of the information" *Id.* at 3069, emphasis supplied.

In application of that standard the Court held that a National Park Service Regulation forbidding camping and sleeping in certain areas of the parks was a reasonable method of conserving a unique national resource which did not unduly inhibit the First Amendment rights of protestors who planned to sleep in the parks as a symbolic demonstration of the plight of the homeless. The Court refused to hold that the government should be held to less restrictive alternatives which could still serve to adequately protect park lands and reminded the litigants that it did not function as a super-legislature, burdened with the responsibility of determining the most appropriate level and means of conservation.

The following term, in *United States v. Albertini*, ___U.S.___, 105 S.Ct. 2897 (1985), the Court affirmed the conviction of the defendant who had re-entered a military base during a public open house subsequent to his having been barred for pouring animal blood on secret Air Force documents. The Court

ruled that application of the statute forbidding re-entry did not violate the defendant's First Amendment rights. It stated that an incidental burden on speech is permissible under *United States v. O'Brien*, *supra*, "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at U.S. ___, 105 S.Ct. 2897. The Court held that, particularly as the case related to the management of military bases throughout the nation, it would not engage in the business of questioning the military's supervision of miscreants:

> "We are persuaded that exclusion of holders of bar letters during military open houses will promote an important governmental interest in assuring the security of military installations. Nothing in the First Amendment requires military commanders to wait until persons subject to a valid bar order have entered a military base to see if they will conduct themselves properly during an open house" *Id.* at 2897.

While admittedly the language of *Clark* and *Albertini* is broad, it is not applicable to the situation at hand because of a vital distinction. In both of those cases the *conduct* which the government had an admitted right to regulate was inextricable from the symbolic expression sought. The government, given those facts, was powerless to permit the protestors to convey their argument without interference with the prohibition against camping. Similarly, the *Albertini* defendant, given the facts of that case, could not convey his message without violating the statute forbidding holders of bar letters from military bases. Had the Supreme Court ruled that less restrictive regulation was constitutionally required, it would have imposed upon the Federal Government the task of formulating a hypothetical level of relief and necessitated the elimination of the sleeping prohibition in *Clark* and the bar letters statute in *Clark*.

Conversely, in the matter under review, the illegal conduct alleged is separate from the legal and protected expression and thus

the Court below could isolate and alleviate the unprotected without adversely impacting upon free speech. The Court of Appeals was thus able to meet the needs of both the state and the defendants and in so doing, it did not face the dilemma posed for the Court in *Clark* and *Albertini*. By the readily available construction of the statute rendered, a function uniquely reserved to the highest court of a state, the Court of Appeals was able to tailor the means used to effectuate the state's interest without legislating or requiring the state to draft a less restrictive and hypothetical mode of achieving its ends. As a result of this construction New York is able to utilize that portion of the statutory scheme permitting a perpetual injunction to be levelled against the illegal conduct while reserving the one year abatement provision for situations such as that typified in *Croatan Books*, *supra*. In so doing, the Court below provided a gradation of remedies tailored to the state's goals and, at the same time, minimized the impact on admittedly protected activity. Again, in contrast to *Clark* and *Albertini* it was able to fashion that remedy by employing an existing legislative scheme, not by ordering the state to legislate a hypothetical level of relief.

The broadness of the application which the respondents assail lies not only in the fact that it would close the Village Book and News Store for one (1) year but also in a recognition that the necessity of that remedy has never been established. While petitioner seeks to squelch sexual activity on the premises, obviously an appropriate state interest, he has attempted nothing less draconian than closure. There has been no attempt by the District Attorney's office to utilize New York's penal laws nor has a permanent injunction against illegal sexual activity been sought.[7] In

[7] The District Attorney's claim that an injunction would be unavailing in view of corporate policy against the commission of such indiscretions by patrons fails to note that violation of corporate policy does not carry with it the contempt of Court sanctions, including jail, which back up the breach of a Court imposed injunction.

conjunction with this lack of law enforcement is the fact that this case revolves around a 19-day investigation conducted almost four (4) years ago. The record contains no allegation that the alleged crimes have been continuing, or so regular or pervasive that they can be deemed immune from normal police procedures. The District Attorney has not argued to that effect nor could he since he concededly has attempted nothing less oppressive than outright closure.

If this case involved a hard fought battle by local law enforcement to clear the Village Book and News Store of patrons who committed sexual indiscretions, the constitutional resolution might involve a different analysis, as it did in *Croatan Books*, *supra*. As it is, however, the case is about a limited amount of activity, short in duration and having occurred long ago.

Given those facts the petitioner cannot state with any force of logic or reality, that the nuisance he seeks to abate is the premises itself which must, therefore, be closed in order to attain that goal. Instead, the reality of this case is that the only nuisance, given the relative infrequency of the alleged crimes and their presumed amenability to criminal law procedures, are the sexual acts themselves. They can be abated by means which are far less drastic than closure and which also serve to effectuate the articulated governmental interest at stake."

In *NAACP v. Clairborne Hardware Co.*, *458 U.S. 886 (1982)*, this Court reversed the grant of injunctive relief and award of damages to businesses which had been economically harmed as the result of a civil rights boycott. The Court held that the boycott

" This case presents the first occasion for the Court of Appeals to construe this previously brothel-oriented statute to a premises where concededly legitimate First Amendment activities prevail. It also presents the Court's first opportunity to construe the statutory provisions in a manner which prevents unlawful activity but, where the facts permit, allows the legal and protected operations to continue.

was a form of protected speech and that while the illegal activity itself was properly enjoined, the State could not proscribe the legal and constitutionally protected expression at least without substantial findings in the record that admittedly violent activity was pervasive and consumed the character of the boycott (*Id.* at 3431-3432). Although political speech is not at stake in this case, the protective mantle of the First Amendment should serve to extend the principles expressed in *Clairborne* to the situation at bar. Reality need not be a stranger to this Court and the reality of this case is that a reversal of the decision below will have the affect of closing this bookstore (and, no doubt, others like it)[10] on the basis of a record sparse in allegations of crime and devoid of explanation of why closure is necessitated. The reality of this case is that

[10] Those states with equivalent nuisance abatement and closure statutes are *Alabama*, Code of Alabama 1975, Civil Practice §6-5-140; *Alaska*, Code of Civil Practice §09.50.170; *Arizona*, Arizona Revised Statutes Annotated §12-802; *Arkansas*, Arkansas Statutes 1947 Annotated, Arkansas Criminal Code §41-3051; *California*, Deering's California Code Annotated, Penal Law §11225; *Colorado*, Colorado Revised Statutes 1973, Criminal Proceedings 16-13-303; *Connecticut*, General Statutes of Connecticut, Public Health and Safety, Chapter 350 §19-316; *Delaware*, Delaware Code Annotated 1974, Courts and Judicial Procedure §10-7101; *District of Columbia*, District of Columbia Code, 1981 Edition, Criminal Offenses §22-2713; *Florida*, Florida Statutes Annotated, Crimes §823.041; *Georgia*, Code of Georgia Annotated, Nuisances §72.301; *Hawaii*, Hawaii Revised Statutes, Hawaii Penal Code §712-1270; *Idaho*, Idaho Code, Nuisances §52-104; *Illinois*, Smith Hurd Illinois Annotated Statutes, Nuisances, Chapter 100½ §1; *Indiana*, Burns Indiana Statutes Annotated §34-1-52.5-1; *Iowa*, Iowa Code Annotated, Police Power §99.1; *Kansas*, Kansas Statutes Annotated, Criminal Procedure §22-3901; *Kentucky*, Baldwin's Kentucky Revised Statutes Annotated, Public Safety and Morals §233.020; *Louisiana*, Louisiana Revised Statutes, Particular Actions §§13 and 4711; *Maine*, Maine Revised Statutes Annotated, Crimes 17 §2741; *Maryland*, Annotated Code of Maryland,

Continued next page

an unpopular point of view is being suppressed — not because it is housed in a dangerous or crime-ridden site, but because it is considered indecent and immoral by a vocal minority. The reality of this case is that a nuisance statute permitting only closure is too heavy handed to be utilized in an area of law where the touchstone of regulation must be precision and sensitivity. The words of the Court in a related context also ring true here and inform this case

Continued

Crimes and Punishments Article 27 §15; *Massachusetts*, Annotated Laws of Massachusetts, Common Nuisances, Chapter 139 §4; *Michigan*, Michigan Statutes Annotated, Chapter 38 § 27A.3801; *Minnesota*, Minnesota Statutes Annotated, Crimes and Criminals §617.33; *Mississippi*, Mississippi Code 1972 Annotated, Chapter 3 §95-3-1; *Missouri*, Missouri Revised Statutes 1978, Crimes and Punishment §567.080; *Montana*, Montana Code Annotated, Crimes §45-8-11; *New Hampshire*, New Hampshire Revised Statutes Annotated 1974, Proceedings in Special Cases §544:1; *New Jersey*, New Jersey Statutes Annotated, Code of Criminal Justice §2C:33-12; *North Carolina*, General Statutes of North Carolina, Offenses Against Public Morals §19-1; *Ohio*, Page's Ohio Revised Code Annotated, Health, Safety, Morals, Title 37, Chapter 3767 §3767.01; *Oregon*, Oregon Revised Statutes §465.110; *Pennsylvania*, Purdon's Pennsylvania Consolidated Statutes Annotated 68 p.s. §467; *Rhode Island*, General Laws of Rhode Island §11-30-1; *South Carolina*, Code of Laws of South Carolina 1976, Civil Remedies and Procedures §15-43-10; *South Dakota*, South Dakota Laws, Judicial Remedies §21-10-10; *Tennessee*, Tennessee Code Annotated §39-6-100; *Texas*, West's Texas Statutes and Codes Civil Statutes §4664; *Utah*, Utah Code Annotated, Nuisances §47-1-1; *Virginia*, Code of Virginia 1950; Nuisances §48-7; *Washington*, 1981 Revised Code of Washington §7.48.240; *West Virginia*, West Virginia Code, Crimes and Their Punishment §61-9-1; *Wisconsin*, Wisconsin Statutes Annotated, Civil Procedure §823.09; *Puerto Rico*, Laws of Puerto Rico Annotated, Penal Code - Title 33 §1185.

where the petitioner seeks to defeat precious constitutional freedoms on the basis of paltry facts which he hopes will remain unquestioned by the judiciary:

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights be defeated by insubstantial findings of fact screening reality." (*NAACP v. Clairborne, supra*, 458 U.S. at 924, citing *Milk Wagon Driver's Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941).

The decision below creates no immunity for illegal conduct from the might of the law, nor does it create a risk of perversion of First Amendment protections. It simply represents the conscientious effort of a state's highest court to, on the record before it, interpret its statutory provisions in a manner faithful to its constitution, and in a way which provides for the elimination of unlawful activity, not at the expense of precious lawful expression.

CONCLUSION

For these reasons, the judgment of the New York State Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

85-437

No. 85-437

In The

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD J. ARCARA, District Attorney of Erie County,
Petitioner,

vs.

CLOUD BOOKS, INC., etc., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

APPENDIX FOR RESPONDENTS

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KENMORE RECORD ADVERTISER. NEWSPAPER ARTICLE OF DECEMBER 3, 1980

FIRE PROPOSAL AIMED AT SHOP

A resolution to amend Kenmore's fire regulations, aimed at an adult book store on Delaware Avenue, is on the agenda for Tuesday night's meeting of the Village Board at 8 in the Municipal Building.

The amendment calls for a change in the fire code regarding the construction and materials used in village buildings. Specifically, the resolution is aimed at the embattled Village Book and News Store, the target of cititzen concern about the spread of pornographic materials in the village.

"The store would have 60 days to comply with the regulation change," Trustee Vincent F. Tower said. "In answer to the concerned citizens, we are putting pressure on them (the store) in addition to what they (the citizens) and Erie County District Attorney Edward Cosgrove are doing."

The store, which has been the site of picketing since May, would be required to change the construction of its walls and the materials used, increase the width of aisles in the store, increase light levels to 10 candlepower and provide lighted exits with an unobstructed view of the film booths in the rear of the store.

BUFFALO EVENING NEWS
ARTICLE OF DECEMBER 4, 1980

2 ORDINANCES WOULD RESTRICT ADULT STORES

Kenmore and Tonawanda are considering legislation aimed at limiting the operation of adult bookstores in both municipalities.

The Kenmore Village Board this week set a public hearing for 8 p.m. Jan. 6 on a proposed fire ordinance that would place fire code restrictions on all amusement booths. The ordinance would require the walls to be made of fire-resistant material, aisles between booths to be at least 50 inches wide, light levels to be at least 10 candlepower [sic] at the floor level and two lighted exits in the room.

The ordinance is aimed primarily at the Village Books and News Store at 3102 Delaware Ave. and the "peep show" booths in its back room, which would require extensive renovation to come into compliance with the ordinance.

The ordinance allows businesses 60 days to comply.

The Tonawanda Common Council set a public hearing for 8 p.m. Jan. 6 on a proposed zoning ordinance that would limit adult businesses to the city's industrial areas.

The ordinance would restrict such businesses to the Gastown area, part of Young Street and an area around the Spaulding Fibre plant on Wheeler Street.

City officials say the ordinance is designed to prevent adult businesses from moving into residential and commercial areas as happened in Kenmore.

The city now has no adult businesses, and city officials say they know of no plans for any adult businesses to move into the city.

Kenmore, Cheektowaga and the Town of Tonawanda have adopted similar zoning ordinances restricting adult businesses to industrial zones.

BUFFALO EVENING NEWS
ARTICLE OF FEBRUARY 2, 1981

MORAL OUTRAGE IGNITES HOUSEWIFE'S MILITANCY

The hottest places in hell are reserved for those who, in a time of great moral crisis, maintain their neutrality. — Dante

By Dan Herbeck

Dante's words were written in 14th century Italy. Today, in 20th century Kenmore, those words are being lived — by Kathy Dibble.

The bright, energetic housewife, mother and anti-pornography crusader has, for the last nine months, been the driving force behind — and in the forefront of — the Concerned Citizens of Kenmore, a group trying to remove an adult bookstore from their village.

Their target is the Village Book & News Store on Delaware Avenue, a few blocks from the cheery little home Mrs. Dibble shares with her husband, Edward, and their three young children.

The store sells more than so-called adult books. Sexual paraphernalia and explicit "peep shows" are also available. When the bookstore opened in October 1979, Mrs. Dibble viewed that as a moral crisis for her village.

"When I heard what kinds of things they were selling there, I couldn't believe it," says the 29-year-old homemaker. "I didn't even know those things could be sold in this country."

Her disbelief quickly became anger. In May of last year, Mrs. Dibble turned up at a citizens meeting in a Kenmore church hall and suggested a massive picketing drive to close the bookstore.

By the end of the meeting, she had been named chairman of the drive. Little did she realize what that would entail.

Today this girl-next-door is nothing short of a full-fledged citizen activist. Her opinions are sought by reporters, and her face is familiar to television viewers who have followed the controversial effort.

As chairman of the Concerned Citizens of Kenmore, Mrs. Dibble is kept busy with speaking engagements, meetings and work on court cases. Citizen groups elsewhere in the state have asked her to help lay the groundwork for similar movements.

[Picture with caption: Kathy Dibble — On the picket line for 195 days.]

In addition, Mrs. Dibble and Sue Nickson, her schedule chairman, still picket regularly and coordinate the picketing activities of some 700 volunteers. And the 18,000 signatures on a petition condemning the store are evidence of the long hours they labor for their cause.

"It's become a full-time job," sighs Mrs. Dibble. "When I started out, I didn't realize the scope of all this."

She had to quit her part-time job in a candy shop but refuses to allow her activities to stand in the way of the time she spends with her children — Matthew, 6, Sara, 4, and Beth, 3.

"During the day, my kids come first," she emphasizes. "I may write some letters or take some phone calls, but I spend most of the day with them."

The Concerned Citizens recently chipped in to buy the Dibbles a phone-answering service to help handle the heavy load of calls that come in each day.

"Sometimes it's like a zoo around here," Mrs. Dibble says. "One day one of the television stations called and said they were coming over to do a live interview in 10 minutes."

Situations like that scare Mrs. Dibble. Despite all the attention she and her crusade have gathered, she is no creature of the media.

"I've heard it said that Lois Gibbs (of the Love Canal Homeowners' Association [sic]) learned how to use the media," she says.

"I could never see myself doing that. I really don't make calls to a lot of reporters. They usually call me . . . I guess I really don't know what is news to them yet. I'm afraid I'll be bothering them if I call."

Which is not to say that Mrs. Dibble is shy when the cameras start rolling.

"I've always been active in a lot of different community and recreational events, since I was in high school at Cardinal O'Hara," she says.

"I haven't been able to get too involved in the past few years because we were having children and there were babies to care for."

She says she'll continue her work with the organization until the bookstore leaves Kenmore or until citizen support for the cause dies. "And," she adds, "there's no sign that it is letting up yet."

She refers to her husband, who does most of the babysitting while she's busy with her other projects, as the "unsung hero" of the protracted campaign.

"He's proud of the part I've played, and he's shown tremendous patience," Mrs. Dibble says.

"It's hard on him. We seldom see each other at night, and he helps with dinner, laundry — things like that."

Smiling as she watches Matthew and Sara play in the living room, Mrs. Dibble says she hopes they will someday appreciate what their mother has done:

"Maybe they'll know one day that I'm doing this for them. I'm not doing this for myself."

BUFFALO COURIER EXPRESS ARTICLE OF MARCH 6, 1981

Film From Adult Bookstore

KENMORE OBSCENITY CHARGES DISMISSED

By Richard Schroeder, Courier-Express Staff Reporter

A town judge dismissed two obscenity charges against the manager and corporation that owns a Kenmore adult bookstore Thursday as a residents group began a campaign to make their fight against the store nationally known.

Tonawanda Town Justice William G. Coleman dismissed two misdemeanor obscenity charges against James N. Savage, manager of Village Books and News Store, 3102 Delaware Ave., and Cloud Books Inc. of Cleveland, Ohio, but left one of two misdemeanor obscenity charges against store clerk Brenda Lehrman in place and scheduled a Mar. 17 hearing on her case.

The charges stemmed from last May 19 when Kenmore Police seized two allegedly obscene films from the store's backroom peepshows.

Coleman ruled that charges against Savage and Cloud Books prepared by the Erie County District Attorney's office were defective because they did not clearly establish that Savage and the company were responsible for the film's presentation or knew them to be obscene.

He ruled the same to be true in connection with one of the charges against Miss Lehrman, but let the other charge stand because it [sic] did not allege she knew the character and content of one of the films.

Coleman withheld rulings on other requests made by store attorney *Paul J. Cambria, Jr.*, who asked that all charges be dismissed on the grounds that Kenmore Justice H. Walker Hawthorne, who first handled the case, was not neutral.

Cambria, also asked that the films be suppressed as evidence.

In a related matter, the Citizens Concerned for Kenmore, which has waged an 11-month fight against the store, announced Thursday that they had started a letter writing campaign that they nope will reach President Reagan and his Cabinet, every U.S. senator and representative, the Supreme Court, the governors and attorneys general of all 50 states, editors of major news publications, the presidents of all major U.S. corporations and a host of other religious and service organizations.

The citizens group campaign consists of a form letter that asks for legislation against pornography and more favorable anti-pornography rulings in the courts. It also details the group's experience with pornography here.

"Kenmore . . . is a typical family-school-church oriented community. Residents are average, middle class Americans. We represent thousands of similar communities across our nation," the letter says.

"There is one important exception. Our community has been singled out as one of the first locations to have a 24-hour, seven-days-a-week pornography operation replete with 24 'peep shows', open displays of sexual devices and explicitly salacious magazines," it continues.

The letter also says that the group will continue its fight against a nationally-known pornography company, which it contends owns Cloud Books.

"If Sovereign News of Cleveland, Ohio, the multi-faceted corporation that operates the Kenmore establishment, feels that, in a state of semi-consciousness, we have become conditioned to sit back in apathetic silence and, in so doing, condone this flagrant display of alleged obscenity, they are terribly mistaken," the letter says.

The Kenmore group began picketing the store last May, about six months after it opened. Village police have made five separate

raids on the store since it opened, resulting in a number of misdemeanor obscenity charges against the store manager, its employees and the corporation that runs it.

Besides the remaining charge against Miss Lehrman, four other cases against Savage and store employees remain pending in town court.

BUFFALO EVENING NEWS
ARTICLE OF MARCH 8, 1981

CITIZEN'S GROUP MULLS PHOTOGRAPHING PATRONS OF KENMORE ADULT BOOKSTORE

Beginning Wednesday, patrons of Village Books and News Store in Kenmore may find themselves being photographed as they leave the adult bookstore which has been the object of citizen picketing for the last nine months.

Kathleen Dibble, chairman of Citizens Concerned for Kenmore, the picketing group, said Saturday her organization's executive committee has decided to supplement its activities at the bookstore by photographing — "completely at random on an intermittent basis over an extended period of time" — people who have been into the store, which has booths for viewing "peep shows" and sells sexual paraphernalia and adult publications, as well as newspapers and cigarettes. The full membership will consider the idea at a meeting Tuesday night.

Sensitive to charges of harassment and to allegations that the activity might violate customers' rights, Mrs. Dibble contended the group has "no intention of publishing these pictures" and that the photographs will merely reinforce the group's perception of the type of person who patronizes such a store. "I would characterize them as generally undesirable, lowlife, not only from seeing them but from sexually-related activities observed around the bookstore," she said. Such activities, she claimed, were mostly masturbation in parked cars.

'Could Be Actionable'

Paul J. Cambria Jr., attorney for the store at 3102 Kenmore Ave., counters that if they show the photographs "to anyone, it could be actionable."

"Their point is to say, 'look at all the undesirable people who go into that bookstore,' " *said Cambria*. "The only way they could

try to demonstate that is to show those photographs. I just find it arrogant for people to think they know what a good person looks like."

Killian Vetter, former executive director of the now-defunct Buffalo chapter of the American Civil Liberties Union, suggested the group's plan is "potentially explosive" because "customers might resent it . . . and confrontation is possible." But Mrs. Dibble said the photographer will be in a car and will be driven away as soon as the picture has been snapped.

'Jeopardizes Rights'

"I don't like the tactic," said Vetter. 'However these pictures are circulaued, it jeopardizes the rights of the customers who don't see themselves doing anything wrong."

Although Mrs. Dibble said the project is "strictly for research purposes" and to counter the notion that only well-dressed, middle-class males frequent such stores, she "wouldn't object" if the announcement of their plans deters customers.

"I want them to have every opportunity not to have their pictures taken," she said.

BUFFALO EVENING NEWS
ARTICLE OF MARCH 18, 1981

COUNTY PROSECUTORS USING CIVIL SUIT TO FIGHT KENMORE ADULT BOOKSTORE

By Matt Gryta

Erie County prosecutors have begun civil proceedings to halt alleged smut-peddling at a controversial Kenmore adult bookstore that has been the center of controversy since it opened in 1979.

In a legal maneuver aimed at cutting through procedural delays found in criminal cases, the Erie County district attorney's office is suing the owners, manager and employees of Village Books and News, 3102 Delaware Ave., on obscenity issues.

At a hearing Monday in State Supreme Court in Buffalo, prosecutors will seek — pending a full trial on the issues — a preliminary injunction halting the sale of alleged obscene material at the store owned by Cloud Books Inc., of Cleveland.

Developing out of a continuing probe of the store with the Kenmore Village Police Department, whose officers were serving summonses in the case Tuesday, the civil suit also seeks court-ordered destruction of all obscene material found at the store.

District Attorney Edward C. Cosgrove said the unusual civil proceeding launched by his office will "accelerate" legal proceedings in the controversy over material sold in the store.

Paul J. Cambria, Jr., [sic] the store's attorney and official spokesman, could not be reached for comment on the latest action by prosecutors who have four obscenity criminal proceedings pending againt the store in Tonawanda Town Court.

Procedural and jurisdictional disputes have led to frequent court hearings linked to criminal charges lodged against the store in 1979 and 1980.

Two such charges recently were dismissed in the Tonawanda Town Court.

Hinting in court papers that they suspect a silent partner may control the Kenmore store, prosecutors issued civil subpoenas against Cloud Books; James N. Savage, manager of the store; store clerks Brenda Lehrman, John Barber and Randy Reaves; and a "John Doe."

The prosecutors' court complaint alleges the store sells magazines, books, pictures, photographs and other material "which are lewd, lascivious, filthy and indecent and disgusting" in violation of the state penal law.

Prosecutors also contend that sales of that material are not protected by the free speech provisions of the U.S. Constitution or the State Constitution.

Material is being sold at the store, prosecutors allege, that "the average person, applying contemporary community standards," would find prurient and that "lack serious literary, artistic, political and scientific value."

In court papers filed with State Supreme Court Justice John C. Broughton for Monday's hearing, prosecutors contend that the sale at the store of allegedly obscene material is damaging to "the health and morals of the community" and needs to be immediately halted under court order.

Material being sold at the store in the form of books and "peepshow" films, prosecutors also allege, is obscene under the state penal law. Prosecutors contend they can prove their claims during a trial.

To back up their claims, prosecutors submitted to the court the names of 14 allegedly obscene magazines and books that can be purchased at the Kenmore store.

Specifically, prosecutors seek court orders declaring certain materia! being sold at the store to be obscene under state law and

giving the Sheriff's Department the right to seize and destroy that material.

Prosecutors also seek court orders permanently barring the store and its owners and employees from selling "any book, magazine, pamphlet, comic book, story paper, writing paper, picture, motion picture, drawing, photograph, figure or image or any written or printed matter of an indecent character."

STATE OF NEW YORK
SUPREME COURT COUNTY OF ERIE

CLOUD BOOKS, INC., d/b/a
VILLAGE BOOK AND NEWS STORE
3102 Delaware Avenue
Kenmore, New York 14217
Plaintiff

against

VILLAGE OF KENMORE: VILLAGE OF KENMORE POLICE DEPARTMENT: et al.,
Defendants

Index No.

Plaintiff designates ERIE County as the place of trial

The basis of the venue is Plaintiff's place of business

Summons

Plaintiff resides at

County of

To the above named Defendant

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, March 11, 1982

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.
Attorney(s) for Plaintiff
Office and Post Office Address
One Niagara Square
Buffalo, New York, 14202
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STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOK AND NEWS STORE
3102 Delaware Avenue
Kenmore, New York 14217,

Plaintiff,

VERIFIED
COMPLAINT

vs.

VILLAGE OF KENMORE; VILLAGE OF KENMORE POLICE DEPARTMENT; ELMER ARNET, Police Chief for the Village of Kenmore; PHYLLIS G. HIGGINS, Village Clerk-Treasurer, Village of Kenmore; DANIEL MARTIN, Building Inspector for the Village of Kenmore; ARTHUR A. NIST, Mayor of Village of Kenmore; MURIEL H. MARCUS, Deputy-Mayor of the Village of Kenmore and Member of the Village of Kenmore Board of Trustees; EDMUND J. O'GRADY, CHARLES J. SOTTILE, PAUL A. BILLONY, Bd. of Trustees, Village of Kenmore,

Defendants.

The Plaintiff CLOUD BOOKS, INC. d/b/a VILLAGE BOOK AND NEWS STORE, by and through his attorneys Lipsitz, Green, Fahringer, Roll, Schuller & James, Paul J. Cambria, Jr., of counsel, for its [sic] Verified Complaint against the Defendants herein, alleges as follows:

PARTIES

Plaintiff

1. The Plaintiff CLOUD BOOKS, INC. is a New York corporation duly organized under the laws of this State and operates the VILLAGE BOOK AND NEWS STORE (hereinafter referred to as "the VILLAGE BOOK AND NEWS") which is located at 3102 Delaware Avenue, Kenmore, New York.

2. That at all times hereinafter mentioned, the VILLAGE BOOK AND NEWS was and is engaged in the exhibition of motion picture films to the general public over the age of 21 through the operation of motion picture film machines. Said motion picture films include, but are not limited to, those which depict sexually frank material.

PARTIES

Defendants

3. The Defendant VILLAGE OF KENMORE is a municipal [sic] corporation established and existing under the laws of the State of New York.

4. The Defendant VILLAGE OF KENMORE POLICE DEPARTMENT and its Chief, ELMER ARNET (hereinafter referred to as "THE POLICE CHIEF"), constitute the chief law enforcement agency in the Village of Kenmore and are affirmatively charged with the administration and enforcement of the Village Ordinances, specifically Local Law No. 4 of 1980, as amended, entitled "A local law to provide for the licensing of coin-controlled amusement or vending devices" (hereinafter referred to as "Licensing Ordinance") and Local Law No. 3 of 1981, as amended, entitled "An act to provide for the licensing of game rooms" (hereinafter referred to as "Game Room Ordinance").

5. The Defendant THE POLICE CHIEF is empowered by Section 4(B) of the Licensing and Game Room Ordinances with a

duty to review and investigate all applications for coin-controlled amusement licenses (hereinafter referred to as Licenses) as well as for Game Room Licenses.

6. The Defendant PHYLLIS G. HIGGINS is the Village Clerk-Treasurer of the Village of Kenmore and in that capacity is charged with the approval, issuance, transference, renewal, denial, revocation, suspension, and substitution of all licenses for coin-controlled amusement devices and game room licenses in the Village of Kenmore.

7. The Defendant DANIEL MARTIN is the Building Inspector for the Village of Kenmore and, as such, is charged with the power to review and investigate all applications for licenses and game room licenses.

8. The Defendant ARTHUR A. NIST is the Mayor of the Village of Kenmore and, as such, is the chief executive officer for the Village of Kenmore.

9. The Defendants MURIAL H. MARCUS, EDMUND J. O'GRADY, CHARLES J. SOTTILE, and PAUL A. BILLONY are each members of the Board of Trustees for the Village of Kenmore and, as such, constitute the sole legislative body for the Village of Kenmore and are each jointly and civilly responsible for the enactment of the License and Game Room Ordinances.

10. This is an action for injunctive relief pursuant to Article 63 of the CPLR and for a judgment pursuant to Article 30 of the CPLR declaring the plaintiff's [sic] rights under the Licensing Ordinance, as amended (annexed hereto as Exhibit "A" is a copy of said Ordinance) and the Game Room Ordinance, as amended (annexed hereto as Exhibit "B" is a copy of said Ordinance).

FACTS

11. The VILLAGE BOOK AND NEW STORE is a commercial establishment engaged in the sale of all types of periodicals, magazines, etc., as well as providing the adult public over the age

of 21 entertainment by means of coin-controlled amusement devices as that term is defined by Section 20B of Local Law No. 4 of 1980 (hereinafter "Licensing Ordinance"), as amended, and Local Law No. 3 of 1981 (hereinafter "Game Room Ordinance"), as amended.

12. The VILLAGE BOOK AND NEWS STORE has been in continuous operation at its present location since September, 1979. Since the VILLAGE BOOK AND NEWS STORE has, on the premises, more than six coin-controlled amusement devices, as that term is defined by Section 20B of the Licensing Ordinance and Game Room Ordinance, it is a "game room" within the meaning of Section 20B of the Game Room Ordinance, and has on premises twenty-eight coin-operated movie machines.

13. These movie machines exhibit, *inter alia*, films which depict material of a sexually frank nature on a continuous basis which, however, are not obscene as a jury drawn from the community has recently adjudged in the case of *People v. Brenda Lehrman*.

14. The above mentioned amusement devices currently generate an average weekly revenue in excess of $1,000.00.

15. It is submitted that the defendants herein, particularly the Kenmore Village Board of Trustees, have engaged in a concerted and systemtic effort to terminate the constitutionally protected business activities of the VILLAGE BOOK AND NEWS STORE by enacting a series of local ordinances specifically designed to force the VILLAGE BOOK AND NEWS STORE out of business or render its business activities so unprofitable that it would be dissuaded from continuing to operate within the Village of Kenmore and that the Licensing and Game Room Ordinances merely represent the latest phases of this concerted plan.

16. To begin with, shortly after the opening of the VILLAGE BOOK AND NEWS STORE in September of 1979, the Board of Trustees enacted Article X-A of the Village Zoning Ordinances

entitled "Adult Uses" (hereinafter referred to as "Adult Use Ordinance") which was designed to bar the operation of "adult uses" anywhere in the Village of Kenmore other than in the Industrial Use District which, upon information and belief, constitutes the area bordering Military Road. (Annexed hereto as Exhibit "C" is a copy of said Ordinance).

17. However, since the VILLAGE BOOK AND NEWS STORE was an existing, non-conforming use and, thus, "grandfathered" in, the Adult Use Ordinance had no immediate effect upon the ability of the VILLAGE BOOK AND NEWS STORE to continue its operations in the Village of Kenmore.

18. Thereafter, on or about the early part of April, 1980, coin-operated motion picture machines were installed within the VILLAGE BOOK AND NEWS STORE premises for the purposes of exhibiting films of a sexually frank character.

19. Upon information and belief, the grounds for such information and source of said belief being conversations had with employees of the VILLAGE BOOK AND NEWS STORE, shortly after the installation of these motion picture machines, various members of the VILLAGE OF KENMORE POLICE DEPARTMENT visited the plaintiff's premises and declared that the movie machines were allegedly in violation of a 1936 Village Ordinance entitled "Licensing Coin-Controlled Amusement Devices not in Violation of Law", said visit occurring on or about April 9, 1980. These policemen, acting under the authority of this 1936 Ordinance, deactivated the movie machines located on the plaintiff's premises and informed the plaintiff's employees that they would be arrested if such machines were reactivated. Furthermore, the plaintiff's employees were informed by members of the VILLAGE OF KENMORE POLICE DEPARTMENT that the VILLAGE BOOK AND NEWS STORE would be subjected to unannounced and frequent "inspections" to insure that the movie machines were not operated.

20. This 1936 Ordinance, however, was later declared unconstitutional by this Court, Honorable Joseph D. Mintz, presiding, in a Memorandum Decision dated May 1, 1980. (Annexed hereto as Exhibit "D" is a copy of this Memorandum Decision). An Order declaring this Ordinance unconstitutional on its face, and as applied, was duly entered on or about May 28, 1980. (Annexed hereto as Exhibit "E" is a copy of said Order).

21. As a result of this Court's decision in the above mentioned matter, the Village Board of Trustees enacted Local Law No. 5, which was adopted on or about July 15, 1980, and which required a license for the operation of coin-controlled amusement and vending devices within the jurisdiction of the Village. As initially enacted, a license to operate a coin-controlled amusement or vending device within the Village of Kenmore was granted upon the payment of a rather stiff fee and upon filing an application with the Village Clerk containing the following information:

(a) the name and address of the owner;

(b) the number of devices for which the application is being made;

(c) a description of the device or devices including the name of the manufacturer, serial number and the general mechanical features;

(d) the name and address of the person having charge of the device or devices;

(e) the name and address of the person having charge of the premises upon which the device or devices are to be located; and

(f) the address of the premises or at which the device or devices are to be located.

(Annexed hereto as Exhibit "F" is a copy of Local Law No. 5 of 1980 as originally adopted.)

22. Despite the oppressive nature of the Licensing Ordinance as initially enacted, the VILLAGE BOOK AND NEWS STORE complied with its provisions and was granted a license by the

VILLAGE OF KENMORE. (Annexed hereto as Exhibit "G" is a copy of the application form filed in 1981.)

23. Thereafter, having failed to terminate the business activities of the VILLAGE BOOK AND NEWS STORE, the defendants herein continued to enact legislation for the explicit purpose of causing the VILLAGE BOOK AND NEWS STORE to incur substantial economic costs or curtail their business activity within the Village.

24. Specifically, on or about August 25, 1980, members of the VILLAGE OF KENMORE POLICE DEPARTMENT executed a search warrant at the premises of the VILLAGE BOOK AND NEWS STORE, and in the course of such execution, took measurements of the interior of the VILLAGE BOOK AND NEWS STORE, specifically in and around the areas surrounding the movie machines as well as the booths which house those movie machines. However, such measurements were not authorized by the search warrant.

26. Furthermore, during the course of the execution of this search warrant on August 25, 1980, various members of the VILLAGE OF KENMORE POLICE DEPARTMENT took pictures of the film booths located therein and, upon information and belief, provided these photos, together with the measurements, to various officials of the VILLAGE OF KENMORE.

26. Upon information and belief, said measurements and photographs were utilized by the defendants, particularly the Village Board of Trustees, to draft legislation specifically aimed at the VILLAGE BOOK AND NEWS STORE with the intent to create considerable cost to the plaintiff. Particularly, your deponent has been informed that on or about December 10, 1980, the Board of Trustees enacted Local Law No. 1 entitled "An Act to Provide for the Elimination of Certain Fire and Health Hazards of Businesses Within the Village of Kenmore" (hereinafter referred to as "Fire Code") with the specific intent on the part of the Village Board of Trustees to create a considerable economic hardship to

the plaintiff if it continued its business operation within the Village of Kenmore. However, despite these attempts, the VILLAGE BOOK AND NEWS STORE was able to comply with the provisions of the Fire Code and was allowed by the Village Building Inspector to continue to operate.

27. Having thus failed to succeed by utilization of the Fire Code, your deponent has been advised that the Village Board of Trustees amended the Licensing Ordinance by Local Law No. 4 of 1981, said amendment being adopted on or about October 6, 1981, which was further amended by Local Law No. 6, of 1981 said amendment being adopted on or about November 3, 1981. These amendments substantially changed the pre-conditions which must be met before a license to operate a coin-controlled amusement device within the Village of Kenmore could be granted. Specifically, as amended, the Licensing Ordinance presently requires disclosure of information not previously requested including, but not limited to the following:

(a) Name, addresses, social security number, date of birth and telephone number of the owner. If the owner is a corporation, unincorporated association, or firm, then the application must further contain the names of the officers, members, directors or holders thereof, together with their addresses, social security numbers, dates of birth and telephone numbers;

(b) The name, addresses, social security number, date of birth and telephone number of the person having charge of the devices;

(c) The name, address, social security number, date of birth and telephone number of the person having charge of the premises upon or at which the device or devices are to be located;

(d) The disclosure of a fact of conviction of any jurisdiction of a felony relating to gambling or obscenity with full disclosure thereof; and

(e) As to each person whose name appears on the application, the fingerprints of said person.

28. The Licensing Ordinance contains a provision (Section 3) which prohibits operation of coin-controlled amusement devices within the Village of Kenmore without a license.

29. Upon information and belief, it is asserted that the disclosure of this information, upon pains of economic retribution (i.e., inability to operate coin-controlled amusement devices within the Village), is sought solely as a means of providing information which will be utilized to facilitate the prosecution of various principals of CLOUD BOOKS, INC. under various provisions of the New York State Penal Law, particularly Penal Law § 235.05(1), and that this information is not sought for any other legitimate or lawful governmental interest or goal.

30. Furthermore, by their amendments of the Licensing Ordinances, particularly their amendment of October 6, 1981, the Village Board of Trustees, for the first time, attempted to draw distinctions in the Licensing Ordinance between coin-operated amusement devices and coin-operated vending devices. Specifically, the Board of Trustees arbitrarily classified juke boxes as "vending devices" when, in actuality, a juke box does not vend or sell any personal property but, rather, provides entertainment and amusement by the insertion of a coin, token or similar object.

31. That heretofore the Village of Kenmore has not required any special license, permit, etc. for the operation of a "game room" within the geographical [sic] jurisdiction of the Village of Kenmore. Moreover, VILLAGE BOOK AND NEWS STORE has not been required, in the past, to pay any special "fee" or otherwise apply for a special license [sic] to operate a "game room".

32. That upon information and belief the Game Room Ordinance was adopted by the legislative body of the Village of Kenmore, the Kenmore Village Trustees, and was enacted on or about October 6, 1981 and, as amended, will take effect on July 1, 1982. Said Ordinance contains the provision (Section 3) which prohibits the operation of a "game room" in the Village of Kenmore without first obtaining a game room license from the Village Clerk and paying the proscribed fees.

33. It is submitted that the Game Room Ordinance constitutes the final attempt by the VILLAGE OF KENMORE to effectively terminate the operation of the VILLAGE BOOK AND NEWS STORE in that the provisions of the Game Room Ordinance, when read in conjunction with other provisions of the Village Ordinances, primarily the Adult Use Ordinance hereinbefore mentioned, results in a complete and total ban upon the VILLAGE BOOK AND NEWS STORE's ability to freely exhibit motion picture films by means of coin-operated movie machines within the Village of Kenmore.

34. Particularly, Section 5(B) of the Game Room Ordinance contains a provision which prohibits the VILLAGE BOOK AND NEWS STORE from exhibiting motion pictures at its present location by means of five or more machines, said provision being effective July 1, 1982. Moreover, pursuant to the terms of the Adult Use Ordinance, as well as the Game Room Ordinance, premises having six or more machines showing "specified sexual activities" or "specified anatomical areas" (*see* §II[f] and [g] of Adult Use Ordinance) may only be operated on Military Road in the Village of Kenmore.

35. Since the enactment of the Game Room Ordinance, representatives of CLOUD BOOKS, INC. have taken steps to ascertain whether suitable property or premises exist within the Village of Kenmore on Military Road at which the VILLAGE BOOK AND NEWS STORE could continue to operate in excess of six coin-controlled amusement devices. However, although a diligent and exhaustive search has been conducted, no suitable location has been found. Thus, the effect of the Game Room Ordinance is to force the VILLAGE BOOK AND NEWS STORE to forego exhibition of motion picture films on the twenty-three movie machines currently operating with a loss in revenue in excess of $35.00 per machine per week.

36. Moreover, it is submitted that Section 5(1) of the Game Room Ordinance was also specifically enacted by the Village

Board of Trustees to curtail, and indeed eliminate, the business activities of the VILLAGE BOOK AND NEWS STORE in that these provisions require any "game room" within the Village of Kenmore to provide 12 square feet of floor space for each game. However, upon information and belief, the motion picture booths which house the movie machines currently located at the VILLAGE BOOK AND NEWS STORE premises, cover an area of 6½ square feet (approximately 3 feet by 2½ feet) and, thus, the VILLAGE BOOK AND NEWS STORE cannot comply with the provisions of Section 5(1).

37. Lastly, the final step of the VILLAGE OF KENMORE'S concerted effort to eliminate the VILLAGE BOOK AND NEWS STORE from the territorial confines of Kenmore is imposed by Section 11(B) of the Game Room Ordinance (hereinafter referred to as the "amortization clause"). This amortization clause requires any and all "non-conforming uses" to comply with the provisions of the Game Room Ordinance by July 1, 1982. However, since the other provisions of the Game Room Ordinance when read in conjunction, with the Adult Use Ordinance, prohibit the VILLAGE BOOK AND NEWS STORE from operating at its present location or indeed, at any location within the Village of Kenmore, the effect of this amortization clause is to require the VILLAGE BOOK AND NEWS STORE to cease the operation of twenty-three movie machines currently on its premises with a loss of revenue in excess of $35.00 per machine per week.

38. The net result of the aforementioned provisions of the Village Ordinances has been to systematically force the VILLAGE BOOK AND NEWS STORE to curtail its present business activity or cease operations within the territorial confines of the Village of Kenmore.

39. That on or about February 18, 1982, the Plaintiff CLOUD BOOKS prepared and submitted an application, on the forms provided by the Defendant for licenses to continue to operate, conduct and maintain the 28 motion picture machines located at

the present location of the VILLAGE BOOK AND NEWS. (Annexed hereto as Exhibit "H" is a said copy of said application). Annexed to said application was a check in the sum of $1,428.00.

40. That on or about February 26, 1982, CLOUD BOOKS, through their attorney Paul J. Cambria, Jr., received a letter from the Defendant HIGGINS informing him that the application for coin-controlled amusement device license was "incomplete as filed" and that "[u]ntil the application is complete it cannot be processed by [her] office" (annexed hereto as Exhibit "I" is a copy of said letter).

41. Defendant HIGGINS' letter of February 26 further advised that in order for the license application to be completed the "[f]ingerprints of persons having charge of 28 movie machines" must be provided.

42. The above mentioned application was filed by the Plaintiff in accordance with Section 4 of the Licensing Ordinance with the Defendant HIGGINS, Clerk of the Village of Kenmore.

43. That the Plaintiff CLOUD BOOKS, by and through its Verified Complaint, and in submitting the above mentioned license application, does now certify that no devices owned by it and for which licensure was sought are maintained or operated in violation of any constitutionally valid law or ordinance.

44. That the 28 movie machines located on the premises of the VILLAGE BOOK AND NEWS are mechanical or electronic devices used or designated to be used for amusement or entertainment purposes and are operated or controlled through the insertion of a coin or coins, token or similar object.

45. That the 28 movie machines located on the premises of the VILLAGE BOOK AND NEWS are "coin-controlled amusement devices" as that term is defined by § 2(B) of the Licensing Ordinance.

46. That § 20B) of the Licensing Ordinance defines "coin-controlled amusement devices" to include movie machines and video games.

47. That a jukebox is a mechanical or electronic device used or designed for purposes of amusement.

48. That a jukebox is a mechanical or electronic device used or designed for purposes of entertainment.

49. That a jukebox is a coin-operated phonograph which provides amusement or entertainment through the playing of music.

50. That a jukebox is operated through the insertion of a coin or coins, token or similar objects.

51. That a jukebox is not used or designed to be used as a means of selling personal property.

52. That Section 4(A)(6) of the Licensing Ordinance requires applications for the licensing of coin-controlled amusement devices to contain the following information:

(1) As to each person whose name appears on the application the fact of conviction in any jurisdiction of a felony or felonies relating to gambling or obscenity with a full disclosure of the offense, time and place of commission, legal proceeding and penalty imposed.

(2) As to each person whose name appears on the application, his fingerprints for the purpose of expediting the investigation of said application.

53. That a licensing application will not be processed by the Defendants, their agents, employees, etc. unless all information required on the form is completed.

54. That failure by the applicant for a license to submit the fingerprints of each person whose name appears on the application will render said application incomplete.

55. The Defendants, their agents, employees, etc. will not process incomplete applications.

56. That Section 4(C) of the Licensing Ordinance requires the CHIEF OF POLICE to cause an investigation to be made of all applicants for coin-controlled amusement device licenses.

57. That the fingerprints provided by applicants are transferred to the CHIEF OF POLICE to aid him in an investigation.

58. That Section 4(C) of the Licensing Ordinance prohibits a license for a coin-controlled amusement device to issue to any person who has been convicted of a felony relating to gambling or obscenity or to any corporation, partnership or association where a member, officer, director or holder of 10% or more of the stock therein has been convicted of any felony relating to gambling or obscenity provided that a Certificate of Relief from Disabilities has not been acquired pursuant to New York Correction Law Article 23-A.

59. That Section 5 of the Licensing Ordinance requires the fee of $50 per year per device and a $1 per tag per device for each coin-controlled amusement device to be licensed in the Village of Kenmore.

60. That the Defendant PHYLLIS HIGGINS caused to be sent to persons who operated coin-controlled amusement and vending devices a notice which sets forth the annual fee for said license. (Annexed hereto as Exhibit "J" is a copy of said notice.)

61. That Section 4(C) of the Licensing Ordinances prohibits the issuance of a license for a coin-controlled amusement device to any person convicted of a felony relating to gambling or obscenity.

62. That Section 4(C) of the Licensing Ordinance permits a license to issue for a coin-operated vending device to persons who have been convicted of a felony or felonies relating to gambling or obscenity.

63. That on or about October 6, 1981, the Defendants MURIEL MARCUS, EDMUND O'GRADY, CHARLES SOTTILE and PAUL BILLONY, the Board of Trustees for the Village of Kenmore, adopted the Game Room Ordinance, which was amended on November 3, 1981, and is currently in effect.

64. That Section 3 of the Game Room Ordinance requires a license to operate game rooms within the Village of Kenmore.

65. That Section 2(B) of the Game Room Ordinance defines the term "coin-controlled amusement device" exactly as that term is defined by Section 2(B) of the Licensing Ordinance.

66. That Section 2(D) of the Game Room Ordinance defines "game room" as any building or place containing six or more coin-controlled amusement devices.

67. That VILLAGE BOOK AND NEWS STORE is a game room within the meaning of Section 2(D) of the Game Room Ordinance.

68. That VILLAGE BOOK AND NEWS STORE was operating as a game room prior to the effective date of the Game Room Ordinance and is thus, a prior non-conforming use.

69. That as of July 1, 1982, the VILLAGE BOOK AND NEWS must obtain a Game Room License in order to maintain their game room.

70. That Section 4(A)(1) of the Game Room Ordinance mandates that any person desiring to maintain or operate a game room in the Village of Kenmore must submit an application to the Village Clerk-Treasurer for a license permitting said operation.

71. That Section 4(A)(6) of the Game Room Ordinance mandates that each person whose name appears on the application must disclose the fact of any conviction in any jurisdiction of a felony or felonies relating to gambling or obscenity with a full disclosure of the offense, time and place of commission, legal proceedings and penalty imposed.

72. That Section 4(A)(7) of the Game Room Ordinance requires each person whose name appears on the application to submit his fingerprints for the purpose of expediting the investigation of the application.

73. That a Game Room License application form will not be processed by the defendants, their agents, employees or assigns unless all information required on the form is completed.

74. That failure of a Game Room License applicant to submit fingerprints of each person whose name appears on the application will render the application incomplete.

75. That failure of a Game Room applicant to submit fingerprints of each person whose name appears on the application will result in the denial of a Game Room License.

76. That Section 4(B) of the Game Room Ordinance authorizes the CHIEF OF POLICE to conduct an investigation into the background of any person applying for a Game Room License.

77. That the fingerprints provided in the application are to aid the CHIEF OF POLICE in conducting his investigation.

78. That Section 4(C) of the Game Room Ordinance prohibits the issuance of a Game Room License to any person who has been convicted of a felony relating to gambling or obscenity or to any corporation, partnership or association where a member, officer, director or holder of 10% or more of the stock of the same has been convicted of any felony relating to gambling or obscenity.

79. That Section 5(A) of the Game Room Ordinance provides that as of July 1, 1982, Game Rooms may only be operated on Military Road and Kenmore Avenue in the Village of Kenmore.

80. That under Section 5(A), a game room cannot be licensed for Delaware Avenue in the Village of Kenmore.

81. That upon information and belief, there are no premises located on Military Road available for sale or lease as a game room.

82. That upon information and belief, the defendants know that there are no premises located on Military Road available for sale or lease as a game room.

83. That pursuant to Article X-A of the Kenmore Zoning Ordinances (hereinafter referred to as "Adult Use Ordinance"), an "adult use" may only be operated in the Industrial Use District.

84. That an "adult use" is defined by Section III of the Adult Use Ordinance to include an adult bookstore and an adult motion picture theatre.

85. That the VILLAGE BOOK AND NEWS STORE is an "adult bookstore" as that term is defined by Section II(a) of the Adult Use Ordinance.

86. That the VILLAGE BOOK AND NEWS STORE is an "adult motion picture theatre" as that term is defined by Section II(d) of the Adult Use Ordinance.

87. That pursuant to the Adult Use Ordinance, the VILLAGE BOOK AND NEWS STORE cannot be located on Kenmore Avenue.

88. That Section 501 of the Game Room Ordinance provides that the owner or operator of any game room must provide at least 12 square feet of floor space within the game room for each coin-controlled amusement device.

89. That Section 501 of the Game Room Ordinance prohibits the operation of a game room unless each device within said room has 12 square feet of floor space.

90. That on August 25, 1980, members of the VILLAGE OF KENMORE POLICE DEPARTMENT executed a search warrant at the VILLAGE BOOK AND NEWS STORE.

91. That on August 25, 1980, Detective Paul Fitzgibbon, and Officers Thomas Hinchey and Gary Scott of the VILLAGE OF KENMORE POLICE DEPARTMENT executed a search warrant at the VILLAGE BOOK AND NEWS STORE.

92. That the August 25, 1980 search warrant did not permit the taking of measurement at the VILLAGE BOOK AND NEWS STORE.

93. That on August 25, 1980, members of the KENMORE POLICE DEPARTMENT in the course of executing the search warrant took measurements of the VILLAGE BOOK AND NEWS STORE and said measurements were made of the areas around the movie machines.

94. That on August 25, 1981, members of the KENMORE POLICE DEPARTMENT in the course of executing a search warrant took measurements in and around the booths which housed the movie machines located at said premises.

95. That on August 25, 1981, members of the KENMORE POLICE DEPARTMENT made notations of the measurements they had taken at the VILLAGE BOOK AND NEWS STORE.

96. Upon information and belief that the measurements made by members of the KENMORE POLICE DEPARTMENT on August 25, 1981 were made available to various officials of the Village of Kenmore for the purpose of drafting legislation.

97. That the game room area in the VILLAGE BOOK AND NEWS STORE does not provide for 12 square feet of floor space per game.

98. That the Defendants know that the game room area in the VILLAGE BOOK AND NEWS STORE does not provide for 12 square feet of floor space per machine.

99. That the Defendants should know that the game room area in the VILLAGE BOOK AND NEWS STORE does not provide for 12 square feet of floor space per machine.

100. That Section 501 of the Game Room Ordinance was passed by the Defendants with full knowledge that the game room area of the VILLAGE BOOK AND NEWS STORE did not provide for 12 square feet of floor space per machine.

101. That the Defendants enacted Section 501 of the Game Room Ordinance with full knowledge that the VILLAGE BOOK AND NEWS STORE cannot comply with said requirements.

102. That the measurements obtained by members of the VILLAGE OF KENMORE POLICE DEPARTMENT on August 25, 1980 were obtained during the course of an illegal search and seizure.

103. That Section 6 of the Game Room Ordinance mandates the payment of a fee of $100 per machine in order to operate a game room or a maximum fee of $1,500.

104. That representatives of the VILLAGE OF KENMORE, particularly the Defendants MARTIN and HIGGINS, have notified the plaintiff that they will collect both the $100 per machine fee and the $50 per license fee for every coin-controlled amusement device contained in a game room. Thus, once the Game Room Ordinance is in effect, the plaintiff will be forced to pay $1,500 for a Game Room License and $51 per machine for a coin-controlled amusement device license.

105. That the Plaintiff CLOUD BOOK, INC. is a game room as that term is defined by Section 2(D) of the Game Room Ordinance in that it has on premises in excess of six coin-controlled amusement devices as that term is defined by Section 2(B) of the Licensing and Game Room Ordinances. As such, CLOUD BOOKS has standing to challenge the Kenmore Ordinances which on their face violate [sic] its constitutional rights.

THE UNCONSTITUTIONALITY OF THE KENMORE LICENSING ORDINANCE

106. The Plaintiff CLOUD BOOKS, repeats, realleges and reiterates each and every allegation contained in paragraphs numbered "1" through "105" with the same force and effect as though fully set forth at length herein.

107. The Plaintiff alleges that the Kenmore Licensing Ordinance (Local Law No. 5, 1980) shall be declared unconstitutional on its face and as applied and that the Defendants should be permanently enjoined from enforcing these provisions so as to prevent or in any way interfere with the Plaintiff's continued lawful

and orderly operation of the VILLAGE BOOK AND NEWS on the grounds that these provisions are unconstitutionally overbroad and vague; are unconstitutionally under inclusive; that they violate the plaintiff's rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution; that said ordinance impermissibly delegates discretion to the Village Clerk, the Chief of Police and the Building Inspector without any unintelligible standard existing to guide the exercise of this discretion; that said ordinance violates the plaintiff's right to equal protection of the law; and, further, that said ordinance denies the plaintiff due process of law for the following reasons:

(a) That the Plaintiff's right under the Constitution of the United States and the State of New York to equal protection of the law is violated by Section 2(B) since the Defendants have arbitrarily exempted certain forms of coin-operated devices which provide amusement and entertainment from the definition of "coin-controlled amusement devices" and further require a lesser fee for said amusement devices than that charged as to the devices maintained by the VILLAGE BOOK AND NEWS STORE which are exactly the same or similar in operation and essential characteristics to the amusement devices on the Plaintiff's premises. Thus, the statute on its face treats unequally business establishments providing entertainment or amusement by means of amusement devices in the absence of any legitimate, substantial, rational or lawful basis for such disparate treatment.

(b) That the Plaintiff's rights under the First, Fifth, Ninth and Fourteenth Amendments of the United States Constitution as well as the corresponding provisions of the New York State Constitution are violated by Section 4(A)(6) and that the Plaintiff is forced to disclose, upon pains of economic retribution, certain types of information which can, in no way, be said to further any legitimate, substantial, rational or overriding governmental interest or goal.

(c) That Section 4(A)(6) violates the Plaintiff's rights to equal protection of the law under the Constitutions of the

United States and State of New York in that said provision requires Plaintiff to disclose, the pains of economic retribution, certain types of information in order to obtain a license to maintain an amusement device where other persons similarly situated who operate other forms of entertainment and amusement devices are not required to disclose said information.

(d) That Section 4(B) and Section 6 violates Plaintiff's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution in that those provisions authorize limitless inspections of the Plaintiff's business premises in the absence of any set or definite limitation as to time, place or scope of inspection and further do not require a showing of probable or reasonable cause before such inspections are conducted thus authorizing inspections to occur for any reason and at the mere whim and caprice of administrative authorities.

(e) That Section 4(B), on its face and as applied, violates the Plaintiff's rights to privacy and free associate in violation of the First, Ninth and Fourteenth Amendments of the United States Constitution as well as the corresponding provisions of the New York State Constitution in that the ordinance, as enacted, does not contain any standards or similar requirements which may limit or confine the unlimited discretion afforded to the Defendant Police Chief regarding any investigation he may conduct into the background of an applicant and further provides unlimited and unrestrained discretion in the hands of the Defendant Police Chief in the application and interpretation of Section 4(B)'s provisions.

(f) That Section 4(C) which prohibits the issuance of licenses to any persons who have been convicted anywhere of a felony relating to obscenity or gambling is impermissibly vague, arbitrary, capricious and violative of the Plaintiff's rights under the Due Process Clause of the United States and New York State Constitutions and further lodges standardless discretion in the hands of the Defendant in that:

(1) Said provision constitutes an impermissible prior restraint upon the exercise of rights presumptively protected

by the First, Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution in that said provisions prohibits the dissemination of presumptively protected forms of communication based upon an impermissible standard which is entirely irrelevant to the time, place and manner of the future exercise of First Amendment rights and further, in the case of such individual, subjects them to double jeopardy.

(2) That said provision prohibits the exercise of communicative activities presumptively protected by the First and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution by creating an unconstitutional irrebutable presumption which must be met prior to issuance of license to engage in protected activity. The presumption contained in this provision is that merely because there has been a prior conviction for obscenity or gambling such conduct continues without exception in the future and thus prohibits said person from engaging in business activity presumptively protected under the New York State and United States Constitutions.

(3) That said provision violates the plaintiff's rights to equal protection of the laws under the United States and New York State Constitutions in that persons similarly situated, particularly those who operate or cause to be operated coin-controlled vending devices as that term is defined by Section 2(C), as well as by persons who maintain amusement and entertainment devices similar in operational characteristic to the movie machines maintained by the VILLAGE BOOK AND NEWS STORE may be granted a license regardless of whether they have been convicted of a felony relating to gambling or obscenity.

(g) That Section 4(B) further violates the plaintiff's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution in that the time period in which an investigation is to be conducted by the CHIEF OF POLICE is impermissibly long and, thus, constitutes an impermissible prior restraint upon the plaintiff's

ability to engage in business activity presumptively protected by the Constitutions of the United States and New York State since in the absence of obtaining a license the plaintiff is prohibited from engaging in said activity.

(h) That Section 5(A) which sets the fee to be paid by an applicant to engage in activity presumptively protected by the First and Fourteenth Amendments to the United States Constitution as well as by the corresponding provisions of the New York State Constitution constitutes an unreasonable tax upon the plaintiff's ability to freely exhibit presumptively protected materials in that the fee charged bears no reasonable, legitimate, substantial, overriding or significant relationship to any proposed governmental purpose or goal and further grants the Defendants standardless discretion to charge lesser fees in that the Village Clerk has charged similarly situated persons who have sought licensure for machines which are similar in operational characteristic purpose to the movie machines located on the Plaintiff's business property, a lesser fee all in violation of the Plaintiff's rights to due process and equal protection of the laws without any intelligible or discernable standard being set for anywhere in the ordinance authorizing the charging of a lesser fee. Thus, the Defendant KENMORE BOARD OF TRUSTEES has impermissibly delegated their authority to an administrative officer without setting forth clear and concise guidelines for the exercise of such discretion.

(i) That Section 5(B), which provides that if a license application is denied, 75% of the fee is returned, constitutes an unreasonable tax and further is completely and totally unrelated to any reasonable, legitimate, justifiable or significant governmental goal or actual cost of administration of said licensing statute.

(j) That the Licensing Ordinance, as composed, bears no substantial or rational relationship to any legitimate state interest or object which may be lawfully obtained, particularly, the protection of the general public's health, welfare and safety.

(k) That the Licensing Ordinance, particularly Section 4(E), regarding the issuance, suspension, denial or revocation of a license does not comport with the requirements of Procedural Due Process since the provisions do not provide for an administrative hearing before a neutral party or otherwise afford an aggrieved party an opportunity to contest or challenge the findings of the Defendants BOARD OF TRUSTEES within the present administrative framework of the Licensing Ordinance as it is currently written.

(l) That the provisions of the Licensing Ordinance are unconstitutionally underinclusive, vague, overly broad and are not based upon any rational basis or upon the service of a legitimate, overriding, significant and sufficient public or governmental interest, and as well constitute an unlawful restraint of trade and unlawful interference with the Plaintiff's right to do business.

108. Unless the Plaintiff complies with the provisions of said Licensing Ordinance, the general penal sanctions of Section 7 will be brought to bear against the Plaintiff. Thus, the specter of prosecution has created and will create a substantial and real chill upon the Plaintiff's unfretted ability to engage in the dissemination and exhibition of materials presumptively protected by the First and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution in that the Plaintiff is forced to either refrain from in any way operating said motion picture machine or face the real prospect of defending prosecutions in the courts of the Village of Kenmore. The result of this being self-censorship of the most blatant form and a declination on the part of the Plaintiff to engage in this activity.

109. By reason of the Licensing Ordinance, Plaintiff is forced and required to elect between pursuing constitutionally protected activities or being prosecuted or being in threat of prosecution, or engaging in self-censorship or a discontinuation of such activities, resulting in the loss of a substantial amount of legitimate revenue and also a surrender of the Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution.

110. The Licensing Ordinance serves no legitimate compelling state interest nor does it possess a rational relationship to any legitimate, overriding and compelling legislative goal. Moreover, this Licensing Ordinance deprives the citizens of the Village of Kenmore of the availability of a legitimate form of entertainment and expression solely because of actions of the Defendants, their agents and employees.

111. The Plaintiff has no other adequate remedy at law since no current legal proceedings such as a criminal prosecution are pending against the Plaintiff. The only relief which would completely abate the irreparable interim injury being suffered by the Plaintiff is his equitable relief. A declaratory judgment with respect to the interpretation and the application of the Licensing Ordinance was solved, directly, expeditiously and with finality the controversy among the parties.

112. That no previous application for the relief requested herein has been made by the Plaintiff.

113. That the Plaintiff has requested the issuance of a Preliminary Injunction restraining the Defendants from enforcing any provisions of the Licensing Ordinance as they apply to the Plaintiff until the issues raised herein have been finally determined.

114. Unless said Preliminary Injunction is granted Plaintiff will suffer irreparable injury which there is no adequate remedy at law. (See annexed Affidavit of Plaintiff, CLOUD BOOKS, INC. by its President Robert Kenwith, filed with this Court in support of a motion for a Preliminary Injunction.)

115. VILLAGE BOOK AND NEWS has been in continuous operation for over two years without interruption. There clearly will be irreparable harm to its business should its operation be curtailed and its customers caused to frequent other competing enterprises which are not so restricted. Financial harm to the Plaintiff would be severe and beyond recoupment especially since it has already contracted for the purchase an exhibition of several motion picture films and, additionally, presently owns all 28 de-

vices on premises, and as a result, great economic injury would be incurred if the Plaintiff were unable to continue to operate said movie machines on its premises during the pending adjudication of the present action unobstructed by the arbitrary and capricious provisions of this Licensing Ordinance for which no action and damages lies.

116. There clearly does not exist any countervailing reason that the Defendants may advance in opposition to a Preliminary Injunction since, prior to the enactment of the present Licensing Ordinance, the VILLAGE OF KENMORE merely required coin-controlled amusement devices to be licensed under the prior provisions of Local Law No. 5 of 1980 which did not contain all of the constitutional defects presently contained in the current Licensing Ordinance and has granted to the VILLAGE BOOK AND NEWS STORE said licenses. Thus, the grant of a Preliminary Injunction would merely maintain the status quo pending the final determination of the present action.

THE UNCONSTITUTIONALITY OF THE KENMORE GAME ROOM ORDINANCE

117. Plaintiff CLOUD BOOKS repeats, realleges and reiterates each and every allegation contained in paragraphs numbered "1" through "16" with the same force and effect as though fully set forth at length herein.

118. The Plaintiff alleges that the Kenmore Game Room Ordinance (Local Law No. 5 of 1981) shall be declared unconstitutional on its face and as applied and that the Defendants should be permanently enjoined from enforcing these provisions so as to prevent or in any way interfering with the Plaintiff's continued lawful and orderly operation of the VILLAGE BOOK AND NEWS on the grounds that these provisions are unconstitutionally overly broad and vague; they violate the Plaintiff's rights under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution as well as the corresponding provi-

sions of the New York State Constitution; that said ordinances impermissibly delegate discretion to the Defendants VILLAGE CLERK, CHIEF OF POLICE and BUILDING INSPECTOR without any intelligible standard existing to guide the exercise of this discretion; that said ordinance violates the Plaintiff's First, Fourth and Fourteenth Amendment rights to the United States Constitution as well as the corresponding provisions of the New York State Constitution; that said ordinance violates Plaintiff's right to the equal protection of the law; and further, said ordinance violates the Plaintiff's rights to due process of the law for the following reasons:

(a) That the Plaintiff's rights under the Constitutions of the United States and the State of New York to equal protection of the laws are violated by Section 2(B) of the Game Room Ordinance since the Defendants have arbitrarily exempted coin-controlled amusement devices from the application of this ordinance which are exactly the same or similar in operation and essential characteristics to the movie machines on the Plaintiff's business in that said machines provide to the public entertainment or amusement. Thus, the statute on its face treats unequally amusement devices providing entertainment in the absence of any legitimate, substantial, rational or lawful basis for such disparate treatment.

(b) That Section 2(D) violates the Plaintiff's rights under the equal protection clause of the New York State and United States Constitutions in that the Defendants have arbitrarily exempted businesses or places providing entertainment by means of five or less amusement devices from the application of this ordinance and, in fact, do not require any special license and permit for the maintenance of less than six devices, said devices being exactly the same or similar in operation and essential characteristics to the amusement devices on the Plaintiff's premises. Thus, the statute on its face treats unequally business establishments providing entertainment by means of amusement devices in the absence of any legitimate, substantial, rational or lawful basis for such disparate treatment.

(c) That the Plaintiff's rights under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitu-

tion as well as the corresponding provisions of the New York State Constitution are violated by Section 4(A) in that the Plaintiff is forced to disclose, upon pains of economic retribution, certain types of information which can, in no way, be said to further a legitimate, substantial and overriding governmental interest or goal.

(d) That Section 4(A) violates Plaintiff's rights to equal protection of the law under the United States Constitution in that places or business premises within the Village of Kenmore which provide entertainment or amusement by means of mechanical or electronical devices similar in essential characteristics and operation of the devices contained on the Plaintiff's business premises are not required to disclose the same sort of information in order to freely maintain or operate said amusement devices.

(e) That Sections 4(B) and (7) of the Game Room Ordinance violates the Plaintiff's rights under the First, Fourth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution in that said provisions authorize limitless inspections of the Plaintiff's business premises in the absence of any set or definite limitation as to the time, place or scope or inspection and do not further require the showing of reasonable or probable cause before said inspection may be conducted. Thus, said provisions authorize the inspections to be conducted for any reason and at any time based upon the mere whim or caprice of administrative officials.

(f) That Section 4(A)(7) violates the Plaintiff's rights to privacy and to free association as guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution in that these provisions force the Plaintiff to disclose upon pains of economic retribution certain types of information and further require disclosure of fingerprints without any substantial, legitimate, significant or overriding governmental interest being stated which justifies said requirement.

(g) That Section 4(A)(7) violates the Plaintiff's rights to self-incrimination as protected by the Fifth and Fourteenth Amendments to the United States Constitution as well as the

munication based merely upon a conviction for a felony, thus rendering the applicant unfit and undesirable to carry on the operation, maintenance or ownership of a game room and further,in the case of such individuals, subjects them to double jeopardy.

(2) That the provision creates an irrebuttable presumption that merely because there has been a prior conviction for obscenity or gambling such conduct continues without exception in the future and such a ground constitutes an unreasonable, illegitimate, and insignificant basis for the denial of a license to engage in business activity presumptively protected by the First Amendment and is further unrelated to any legitimate time, place or manner restriction upon the free dissemination of materials presumptively protected by the First Amendment.

(3) These provisions constitute an impermissible prior restraint upon the unfretted dissemination of materials presumptively protected by the First Amendment in that conviction of a felony relating to obscenity or gambling is not a legitimate basis upon which to deny a license to disseminate materials presumptively protected by the First Amendment.

(k) That Section 4(D) regarding the issuance, suspension, denial or revocation of a license does not comport with the requirements of procedural due process since these provisions do not provide for an administrative hearing by a neutral party or otherwise afforded an aggrieved party an opportunity to contest or challenge the findings of the Defendant Board of Trustees within the present administrative framework the ordinance is currently written and further, said ordinance grants the VILLAGE CLERK unfettered discretion denying an ordinance in that no standards are set forth upon which a game room license may be denied, revoked, suspended or altered.

(l) That Section 5(A) which prohibits the operation of game rooms on premises located only on Military Road and Kenmore Avenue constitutes an impermissible restriction upon Plaintiff's ability to engage in business activity presumptively protected by the First and Fourteenth Amendments to the United States Constitution and the correspond-

corresponding provisions of the New York State Constitution in that upon pains of economic retribution and ability to engage in a business activity presumptively protected by th. First Amendment, the Plaintiff is forced to disclose information of a testimonial nature which would provide a link in the chain of evidence necessary to prosecute under various provisions of the New York State Penal Law and, additionally, by providing said information with fingerprints the representative of Plaintiff are threatened with a substantial and real risk of prosecution.

(h) That Section 4(B) of the Game Room Ordinance requiring the CHIEF OF POLICE to investigate the background of all applicants on its face, and as applied, violates the Plaintiff's rights to privacy and free association as protected by the First, Ninth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution in that said provision authorizes Defendant CHIEF OF POLICE to investigate the background of all persons whose name appears on a license application without any discernable standards being set forth which at all guides the exercise of said discretion.

(i) That Section 4(B) which provides for a 45-day period before the game room license is automatically granted, constitutes an impermissible prior restraint upon the Plaintiff's ability to engage in the free dissemination of materials presumptively protected by the First Amendment.

(j) That Section 4(C) which prohibits the issuance of licenses to persons who have had previous convictions for a felony regarding obscenity or gambling is impermissibly vague; arbitrary, capricious and violative of the Plaintiff's rights ur[illegible] the Due Process Clause of the United States and New York State Constitutions and further lodges standardless discretion in the hands of the Defendants in that:

(1) Said provisions constitute an impermissible prior restraint on the exercise of rights presumptively protected by the First and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the New York State Constitution in that it prohibits the dissemination of presumptively protected forms of a com-

ing provisions of the New York State Constitution in that this ordinance bans all forms of expression by means of motion picture films within the Village without furthering a sufficient, significant, overriding and compelling governmental interest in that no suitable locations exist within the Village of Kenmore upon which materials dealing with sexually frank matters which are exhibited by means of motion picture machines may be operated anywhere in the territory confines of the Village of Kenmore and is further overly broad, vague, underinclusive and does not constitute a valid time, place and manner restriction.

(m) That Section 5(E) which mandates that the owner of the game room maintain "good order" is impermissibly overbroad and vague and open to subjective interpretation on its face in that the ordinance does not contain any discernible standards by which the relevant administrative officials are to determine what constitutes "good order".

(n) That Section 5(H) which requires one person for each ten games in a game room is patently unreasonable, overbroad and underinclusive and is not related to any legitimate, overriding or substantial governmental interest in that the game room ordinance required one person per ten machines without any legitimate interest being advanced for said provision.

(o) That Section 5(I) prohibits the operation of a game room unless the floor space on premises provides for 12 square feet of floor area per game constitutes an impermissible prior restraint upon the Plaintiff VILLAGE BOOK AND NEWS STORE'S ability to conduct business and further violates the rights to equal protection and due process in that said provision was specifically aimed at the VILLAGE BOOK AND NEWS STORE so as it could not comply with this provission and, in fact, was obtained through a result of an illegal search and seizure all in violation of the Plaintiff's First, Fourth and Fourteenth Amendment rights under the United States Constitution as well as the corresponding provisions of the New York State Constitution. Furthermore, it is submitted that this area restriction is not supported by any substantial, overriding, compelling or significant governmental interest or any other constitutionally valid rational

and is merely a veiled attempt by the Defendants to compel Plaintiff from exhibiting motion pictures which deal with sexually frank matters on the movie machines contained at the VILLAGE BOOK AND NEWS STORE premises.

(p) That Section 6(A) constitutes an unreasonable tax upon the Plaintiff's ability to engage in business activity presumptively protected by the First Amendment and further that said fee is completely and totally unrelated as to any reasonable administrative costs incurred by the VILLAGE OF KENMORE and is not justified by any legitimate governmental interest and further constitutes a double taxation since the same machines are required to pay a $50 fee pursuant to the provisions of the Kenmore Licensing Ordinance.

(q) That the amortization clause of the Game Room Ordinance constitutes an arbitrary and unlawful enactment which, when read in conjunction with the Adult Use Ordinance, imposes a complete and total ban upon the VILLAGE BOOK AND NEWS STORE'S ability to freely disseminate or exhibit materials presumptively protected by the First and Fourteenth Amendments to the United States Constitution, as well as by Article I, Section 8 of the New York State Constitution without any substantial, significant, compelling or legitimate governmental interest or goal being advanced to warrant the prohibition, especially in light of the fact that no adequate alternative outlets for the exhibition or dissemination for such presumptively protected forms of communications currently exist or could exist within the Village of Kenmore. Indeed, the effect of these provisions is to drastically curtail not only the number of adult mini-movie theatres located in the Village of Kenmore but, in fact, place a complete future ban upon the operation of any other adult mini-movie theatres which could be located in the Village.

(r) That the provisions of the Game Room Ordinance when read in conjunction with the Adult Use Ordinance are not proper time, place, manner regulations which are content neutral but, instead, are specifically aimed at the business activities presently being conducted at the VILLAGE BOOK AND NEWS STORE within the Village of Kenmore with the intent of terminating said business activities.

(s) That the amortization clause of the Game Room Ordinance, when read in conjunction with the Adult Use Ordinance, serves no legitimate municipal interest which makes it reasonable to regulate and/or exclude this sort of commercial use from the territorial confines of the Village of Kenmore while allowing a variety of other commercial uses to be established without similar restrictions being placed on a variety of other commercial uses.

(t) That the amortization clause of the Game Room Ordinance constitutes an unreasonable taking of a vested property right without just compensation in violation of the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, as well as the corresponding provisions of the New York State Constitution in that said amortization clause is completely unreasonable and is not justified by any overriding, significant or substantial governmental interest or concern, nor was said provision enacted to serve a legitimate, overriding, significant governmental interest or goal.

(u) That the amortization clause of the Game Room Ordinance is in violation of the Plaintiff's rights to equal protection of the law as guaranteed by the United States and New York Constitutions in that similarly situated pre-existing, non-conforming uses are not, nor ever have been, required to, in effect, cease operation of their business activities within the Village of Kenmore while the VILLAGE BOOK AND NEWS STORE is compelled to do so.

(v) That the amortization clause of the Game Room Ordinance constitutes a violation of the Plaintiff's rights under the equal protection clauses of the New York State and United States Constitutions in that said Ordinance completely prohibits the VILLAGE BOOK AND NEWS STORE from continuing its business activities within the Village of Kenmore without a similar prohibition being placed upon other business establishments which exhibit by means of coin-operated amusement devices forms of expression on machines which are similar in operational characteristics to the movie machines currently located at the premises of the VILLAGE BOOK AND NEWS STORE, nor upon any other business establishments providing various forms of entertainment and amusement in the Village.

(w) That Section 2(D) which arbitrarily sets the definition of a "game room" at establishments with five or less coin-operated amusement devices, violative of the Plaintiff's rights under the Due Process Clause of the New York State and United States Constitutions in that the definitions are arbitrary, capricious, and further serve no legitimate, compelling, overriding or significant governmental interest or goal.

119. That unless the Plaintiff complies with the provisions of the Game Room Ordinance, the general penal sanctions of Section 8 will be brought to bear against the Plaintiff. Thus, the specter of prosecution has created and will create a substantial and real chill upon the Plaintiff's unfettered ability to engage in the dissemination and exhibition of materials presumptively protected by the First and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the New York State Constitution and, in fact, once said ordinance is in effect, the Plaintiff will be completely and totally barred from engaging in presumptively protected business activity within the VILLAGE OF KENMORE.

120. By the existence of the foregoing Game Room Ordinance, Plaintiff is forced and required to forego pursuing a lawful and orderly business enterprise and thus being deprived of legitimate business revenue by complying with said provisions as well as forced to require to forego pursuing business activity presumptively protected by the First Amendment.

121. That the statutory scheme herein serves no legitimate, compelling, overriding state interest nor does it possess a rational relationship to any legitimate or valid legislative goal. Moreover, this ordinance deprives the citizens of the VILLAGE OF KENMORE of the availability of a legitimate form of entertainment and recreation within the Village limits thus depriving the public at large from viewing these materials.

122. The Plaintiff has no adequate remedy at law since no current legal proceeding such as criminal prosecutions are pending

against the Plaintiff. The only relief which would completely abate the irreparable interim injury being suffered by the Plaintiff is equitable relief. A Declaratory Judgment with respect to the interpretation and application of the aforementioned provisions of the Game Room Ordinance will solve directly, expeditiously and with finality the controversy among the parties.

123. That no previous application for the relief requested herein has been made by this Plaintiff as to the Game Room Ordinance.

124. That the Plaintiff has requested the issuance of a Preliminary Injunction prohibiting the Defendants from enforcing any provisions of the Game Room Ordinance as they apply to the Plaintiff until the issues raised herein have been finally determined.

125. Unless said Preliminary Injunction is granted, Plaintiff will suffer irreparable injury for which there is no adequate remedy at law (see annexed Affidavit of Plaintiff CLOUD BOOKS, INC. through its President Robert Kenwith which is filed with this Court in support of a Motion for Preliminary Injunction).

126. Moreover, there clearly does not exist any countervailing reason that the Defendants may advance in opposition to a Preliminary Injunction since, prior to the enactment of the present Game Room Ordinance, the VILLAGE OF KENMORE did not require a special license in order to operate a game room nor were game rooms restricted to specified locations with the VILLAGE OF KENMORE or, indeed, were game rooms such as that operated by the Plaintiff barred from the Village's territorial jurisdiction. Thus, the grant of a Preliminary Injunction would merely maintain the status quo pending the final determination of the present action.

127. Thus, the Plaintiff is entitled to a Preliminary Injunction prohibiting the Defendants from enforcing the provisions of the Kenmore Game Room Ordinance and otherwise interfering with

the operation of the VILLAGE BOOK AND NEWS STORE pending a final resolution of this action.

128. That the Plaintiff hereby submits that the premises of the VILLAGE BOOK AND NEWS STORE are in full compliance with all other valid health, safety, fire, etc. regulations and that said premises are not otherwise in violation of any Village ordinance or law.

129. That the present use of the VILLAGE BOOK AND NEWS STORE at 3102 Delaware Avenue is in all respects compatible with the surrounding area and with other permitted uses in the zone in which the VILLAGE BOOK AND NEWS STORE is located.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

AS AND FOR A FIRST CAUSE OF ACTION, THE PLAINTIFF ALLEGES AS FOLLOWS:

130. The Plaintiff repeats, realleges and reaffirms the allegations set forth in paragraphs "1" through "129" herein and incorporate those paragraphs with specific reference.

131. The Plaintiff respectfully requests relief pursuant to Article 63 of the CPLR enjoining the Defendants from enforcing the provisions of the Kenmore Licensing Ordinance and the Kenmore Game Room Ordinance so as to prevent, in any way, or interfere in any way with the Plaintiff's unfettered ability to engage in business activity presumptively protected by the First Amendment.

AS AND FOR A SECOND CAUSE OF ACTION, THE PLAINTIFF ALLEGES AS FOLLOWS:

132. The Plaintiff repeats, realleges and reaffirms the allegations set forth in paragraphs "1" through "131" herein and incorporate those paragraphs with specific reference.

133. As and for a Second Cause of Action, the Plaintiff prays for a judgment pursuant to Article 30 of the CPLR declaring the provisions of the Kenmore Licensing Ordinance and Kenmore Game Room Ordinance unconstitutional on their face and as applied to the movie machines which are the subject of this action.

134. The Plaintiff further prays for the issuance of a Preliminary Injunction so that during the pendency of this action the Defendants be totally enjoined and restrained from enforcing the provisions of the Licensing and Game Room Ordinances or from denying licenses to the Plaintiff for the operation of the motion picture machines on its premises or from, in any way, interfering with the operation and distribution of those devices which are currently located on the premises of the Plaintiff or for which a license application has been filed herein.

135. As previously set forth, Plaintiff has suffered and will suffer irreparable economic harm as well as irreparable damage unless the Defendants are enjoined from enforcing the provisions of said statutes pending a final resolution of this action.

136. Finally, upon information and belief, the likelihood of Plaintiff's success in this matter is great considering the substantial constitutional defects existing in the present Licensing and Game Room Ordinances as previously discussed. Furthermore, ordinances strikingly similar to those involved here have been declared unconstitutional by various appellate courts across this state and county.

137. Moreover, not only the rights of the Plaintiff are at stake here but the rights of the public at large who will be severely effected by the existence and enforcement of Licensing and Game Room Ordinances in that a substantial segment of the general public will be prohibited from obtaining and viewing materials presumptively protected by the First Amendment.

138. WHEREFORE, plaintiff demands judgment against the Defendants as follows:

(1) An Order declaring the provisions of Local Law No. 5 of 1980 and Local Law No. 5 of 1981 unconstitutional on their face and/or as applied to the Plaintiff in that they completely violate and unreasonably restrict the rights of the Plaintiff under the United States and New York State Constitutions.

(2) That a Preliminary and Permanent Injunction be issued prohibiting the enforcement of the aforementioned sections of the Licensing and Game Room Ordinances against the Plaintiff herein.

(3) That this Court grant the Plaintiff such other, further and different relief as this Court may deem just and proper under the circumstances.

Dated: Buffalo, New York
March , 1982

Yours, etc.
LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.
Attorneys for Plaintiff
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

VERIFICATION

STATE OF OHIO)
COUNTY OF CUYAHOGA)
CITY OF CLEVELAND)

ROBERT KENWIRTH, being duly sworn, deposes and says: that he is the President of the Plaintiff Corporation, Cloud Books, Inc.; that he is reading the foregoing Verified Complaint and knows the contents thereof; that the same is true to the knowledge of the Plaintiff except as to those matters therein stated to be alleged upon information and belief, and to those matters he believes them to be true.

[Signature]
ROBERT KENWIRTH

Sworn to before me this
[10th] day of March, 1982

[Notorization]

EXHIBIT A OF COMPLAINT: LOCAL LAW NO. 4 OF 1981. VILLAGE OF KENMORE ORDINANCE

[Local Law #5 of 1980]
Adopted July 15, 1980
[as amended 10-6-81/and as amended 11-3-81]

LOCAL LAW NO. 4 of 1981 entitled
A LOCAL LAW TO PROVIDE FOR THE LICENSING OF COIN-CONTROLLED AMUSEMENT OR VENDING DEVICES

BE IT ENACTED BY THE BOARD OF TRUSTEES OF THE VILLAGE OF KENMORE, NEW YORK, as follows:

Section 1. Purpose and Intent — It is the purpose of this local law to provide for the licensing of coin-controlled amusement or vending devices located within the Village of Kenmore, for the procedures to be followed with respect to administration of this law, and for the fees to be collected in connection therewith. In enacting this local law, the Board of Trustees finds that the licensing of the foregoing devices and the production of revenue thereby is in the best interest of the Village of Kenmore, promotes the good government of the Village, its management and business, and preserves the property and general welfare of the inhabitants of the Village.

Section 2. Definitions — As used in this local law, the following terms shall have the meanings indicated:

A. Person — one or more individuals, a partnership, an unincorporated association, or a domestic or foreign corporation.

B. Coin-controlled amusement device — any mechanical or electronic device used or designated to be used, for amusement or entertainment purposes, operated or controlled through the insertion of a coin or coins, token or similar object, or through the charging of a fee for use, including, but not limited to, games

known as bagatelle, baseball, football, foosball, pinball, bowling, soccer, shuffleboard, and movie machines.

C. Coin-operated vending devices — any mechanical or electronic device used or designated to be used for the vending of personal property operated or controlled through the insertion of a coin or coins, token, or similar object, including, but not limited to, machines designated to vend cigarettes, ice, food and drink of any kind, and sundries, and specifically including jukeboxes.

D. Owner — a person who is the record owner, contract purchaser, receiver, assignee, lessee or bailee of one or more coin-controlled amusement or vending devices.

Section 3. Licensing — No person shall place, deliver for use, permit the use, or use any coin-controlled amusement or vending device on any premises within the Village of Kenmore, whether or not such premises are under the control of such person, without a license to do so having first been obtained from the Village as hereinafter provided.

[Section 4. Administration]

A. The owner of one or more coin-controlled amusement devices or coin-operated vending devices, or the authorized agent of such owner, desiring to place, deliver for use, permit the use, or use such device or devices shall make and submit an application to the Clerk/Treasurer's Office of the Village for a licence permitting such use. Said application shall be made on a form supplied by the Village, shall be signed by the applicant and shall contain a certification under oath, made by the applicant, that the information contained in the application is complete, accurate and truthful to the best of his knowledge and belief. Said application shall require the following information:

1. The name, address, social security number, date of birth and telephone number of the owner and the applicant, if same shall be the agent of the owner. If the foregoing are a partnership, unincorporated association, firm or corporation, the names of the officers, members, directors or holders thereof together with their addresses, social security numbers, dates of birth and telephone numbers.

2. The number of devices for which application is being made.

3. A description of the device or devices, including the name of the manufacturer, serial number if any, and its general mechanical features.

4. The name, address, social security number, date of birth and telephone number of the person having charge of the device or devices.

5. The name, address, social security number, date of birth and telephone number of the person having charge of the premises upon or at which the device or devices are to be located, together with a description of the character of the business as carried on at such premises.

6. With respect to applications for the licensing of coin-controlled amusement devices:

a. as to each person whose name appears on the application; the fact of conviction in any jurisdiction of felony [or felonies relating to gambling or obscenity] [11-3-81 amendment] with a full disclosure of the offense, time and place of commission, legal proceedings and penalty imposed.

b. as to each person whose name appears on the application, his fingerprints for the purpose of expediting the investigation of said application.

B. Upon receipt of the completed and signed application and upon receipt of the requisite license fee computed pursuant to the schedule of fees in effect at the time of application, the Clerk/Treasurer's Office shall refer all applications relating to coin-controlled amusement devices to the Building Inspector to determine whether the premises where the device or devices are to be located comply with all applicable laws, ordinances, rules and regulations of the Village, and to the Chief of Police who shall

cause an investigation to be made of the background of the applicant to determine that all persons involved can reasonably be expected to operate the devices in accordance with law and free from gambling and other illegal conduct. The foregoing investigations shall be completed within 45 days from the time of filing of a completed application. In the event that any such investigation does not result in a report within the foregoing time period, said application shall be deemed to be approved by the Building Inspector and Chief of Police.

C. If after review of the application and the reports of the Building Inspector and Chief of Police the Clerk/Treasurer's Office finds that all requirements of the local law and any other applicable laws, ordinances, rules and regulations of the Village have been met, said office shall issue the license permitting use of the coin-controlled amusement or coin-operated vending device or devices, in accordance with Subdivision D below; provided, however, that no such license shall issue for any coin-controlled amusement device which shall be prohibited from use by the laws of the State of New York, such as a gambling device or slot machine; and provided further that except as provided in New York Correction Law Article 23-A, no such license shall issue to be held by any person who has been convicted of a felony [relating to gambling or obscenity] [11-3-81 amendment] or by any corporation, partnership or association, a member, officer, director or holder of 10% or more of the stock of which has been convicted of any felony [relating to gambling or obscenity] [11-3-81 amendment].

D. The Clerk/Treasurer's Office shall follow the following procedures in connection with the issuance of said licenses:

1. In the event that the application was made on more than one device, a license shall be issued for each device.

2. Any and all licenses issued shall be conspicuously displayed by the owner at the premises where the device or devices are placed.

3. A tag or tags bearing the same number as the license or licenses, as the case may be, shall be issued to the applicant, which tags shall be securely attached by the applicant to each device licensed.

4. No license or tag shall be transferred from one device to another or from one location to another.

E. If an application for a license or licenses is denied by the Clerk/Treasurer's Office, the grounds for such denial shall be set forth in writing. The applicant shall be entitled to a hearing before the Board of Trustees of the Village, if requested, within fourteen (14) days following notice of the denial of the application. The applicant shall be afforded the opportunity at such hearing to present evidence and witnesses on his behalf in connection with the application. Following such hearing, the said Board shall render a determination on the application within twenty (20) days. Said determination shall be set forth in writing and shall state the grounds therefor.

Section 5. Fees

A. The required license fees for each coin-controlled amusement or vending device shall be as follows, the sum of $50.00 per annum per device plus the sum of $1.00 for each tag.

B. All license fees and corresponding tag fees shall be payable in advance and shall accompany the application. Each license and corresponding tag shall expire on the 31st day of December next succeeding the date of issuance. If a license is denied, seventy-five percent (75%) of the fee shall be returned to applicant.

C. The fees fixed herein may be modified or changed from time to time by resolution of the Board of Trustees of the Village.

Section 6. Inspection

Any duly authorized employee of the Village bearing proper credentials and identification shall be permitted to enter all prop-

erties for the purpose of inspection and observation as to compliance with this local law.

Section 7. Penalties

A. Any person who shall permit the use of a coin-controlled amusement or vending device without first obtaining the required license therefor shall be in violation of this local law, shall be given written notice of the requirements hereunder, and shall be advised to cease and desist from use of the device or devices until such time as a proper license shall be obtained.

B. Any person who shall continue any violation of this local law shall be guilty of violation with respect to each device and on conviction thereof shall be fined in an amount not exceeding Twenty-Five Dollars ($25.00) for each violation. Each day in which any such violation shall continue shall constitute a separate violation.

Section 8. Repealer

This local law shall supercede all prior local laws, ordinances, rules and regulations relative to the licensing of coin-controlled amusement or vending devices, and they shall be null and void as of the effective date hereof.

Section 9. Partiel Invalidity

If any clause, sentence, paragraph or part of this local law or application thereof to any person or circumstances shall be adjudged by any court to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof or the application thereof to other persons and circumstances but shall be confined to its operation to the clause, sentence, paragraph or part thereof and the persons and circumstances directly involved in the controversy in which the judgment shall have been rendered.

Section 10. Effective Date

A. This local law shall take effect immediately upon its being duly filed in the Offices of the Secretary of State and State Comptroller.

B. Persons using a device or devices as of the effective date of this local law who shall not possess a license as of said date shall have thirty (30) days after said date to obtain the license or licenses required under this local law.

PUBLISHED BY ORDER OF THE BOARD OF TRUSTEES OF THE VILLAGE OF KENMORE

Phyllis G. Higgins
Village Clerk/Treasurer

Dated: May 21, 1980
Published: May 28, 1980

EXHIBIT B OF COMPLAINT: LOCAL LAW NO. 5 OF 1981. VILLAGE OF KENMORE ORDINANCE.

[adopted 10/6/81; as amended 11-3-81]

LOCAL LAW INTRODUCTORY NO. 5 of 1981 ENTITLED AN ACT TO PROVIDE FOR THE LICENSING OF GAME ROOMS

BE IT ENACTED BY THE BOARD OF TRUSTEES OF THE VILLAGE OF KENMORE, NEW YORK, as follows:

Section 1. **Purpose and Intent** — It is the purpose and intent of this local law to provide for the control of game rooms within the Village of Kenmore through the licensing thereof, for the procedures to be followed with respect to the administration of this law, and for the fees to be collected in connection therewith. In enacting this local law, the Board of Trustees finds that the licensing of game rooms is in the best interest of the Village of Kenmore, promotes the good government of the Village, its management and business, and preserves the public safety, property, good morals and general welfare of the inhabitants of the Village.

Section 2. **Definitions** — As used in this local law, the following terms shall have the meanings indicated:

A. Person — one or more individuals, a partnership, an unincorporated association, or a domestic or foreign corporation.

B. Coin-controlled amusement device — the definition shall be as same appears in Section 2, Subdivision B of Local Law No. 5 of 1980 of the Village of Kenmore, as amended.

C. Owner — a person who is the record owner, contract purchaser, receiver, assignee, lessee or bailee of one or more coin-controlled amusement devices.

D. Game room — a building or place containing [six] or more coin-controlled amusement devices. This definition does not include any device the possession or use of which is prohibited by law.

Section 3. **Licensing** — No person shall maintain or operate a game room within the Village of Kenmore, whether or not such game room is under the control of such person, without a license to do so having first been obtained from the Village as hereinafter provided.

Section 4. **Administration.**

A. Any person desiring to maintain or operate a game room shall make and submit an application to the Clerk/Treasurer's Office of the Village for a license permitting such a game room. Said application shall be made on a form supplied by the Village, shall be signed by the applicant, and shall contain a certification under oath that the information contained in the application is complete, accurate and truthful to the best knowledge and belief of the applicant. Said application shall require the following information:

1. The name, address, date of birth, social security number and telephone number of the proposed operator of the game room. If the operator is a partnership, unincorporated association, firm or corporation, the names of the officers, members, directors or holders thereof together with their addresses, social security numbers, dates of birth and telephone numbers.

2. The number of devices which are to be placed in such game room.

3. A description of the devices including the name of the manufacturer, serial number, if any, and their general mechanical features.

4. The name, addresses, social security number, date of birth and telephone number of the person having charge of the devices.

5. The address of the premises upon or at which the devices are to be located.

6. As to each person whose name appears on the application, the fact of conviction in any jurisdication of a felony [or felonies relating to gambling or obscenity] with a full disclosure of the offense, time and place of commission, legal proceedings and penalty imposed.

7. As to each person whose name appears on the application, his fingerprints for the purpose of expediting the investigation of said application.

B. Upon receipt of the completed and signed application and upon receipt of the requisite license fee computed pursuant to the schedule of fees in effect at the time of application, the Clerk/Treasurer's Office shall refer all applications relating to game rooms to the Building Inspector to determine whether the premises where the device or devices are to be located comply with all applicable laws, ordinances, rules and regulations of the Village, and to the Chief of Police who shall cause an investigation to be made of the background of the applicant to determine that all persons involved can reasonably be expected to operate the game room in accordance with law and free from gambling and other illegal conduct. The foregoing investigations shall be completed within forty-five (45) days from the time of filing of a completed application. In the event that any such investigation does not not result in a report within the foregoing time period, said application shall be deemed to be approved by the Building Inspector and Chief of Police.

C. If after review of the application and the reports of the Building Inspector and Chief of Police the Clerk/Treasurer's Office finds that all requirements of this local law and any other applicable laws, ordinances, rules and regulations of the Village have been met, said office shall issue the license permitting operation of the game room in accordance with the further provisions of this local law; provided, however, that no such license shall issue for any such game room which shall contain or employ devices prohibited from use by the laws of New York, such as a gambling

device or slot machine; and provided further that, except as provided in New York Correction Law Article 23-A, no such license shall issue to be held by any person who has been convicted of a felony [relating to gambling or obscenity] or by any corporation, partnership or association, a member, officer, director or holder of 10% or more of the stock of which has been convicted of any felony [relating to gambling or obsenity.]

D. If an application for a license or licenses is denied by the Clerk/Treasurer's Office, the grounds for such denial shall be set forth in writing. The applicant shall be entitled to a hearing before the Board of Trustees of the Village, if requested, within fourteen (14) days following notice of the denial of the application. The applicant shall be afforded the opportunity at such hearing to present evidence and witnesses on his behalf in connection with the application. Following such hearing, the said Board shall render a determination on the application within twenty (20) days. Said determination shall be set forth in writing and shall state the grounds therefor.

Section 5. **Limitations and Operation.**

A. Game rooms may be licensed for premises located on Military Road and Kenmore Avenue within the Village of Kenmore.

B. The owner and operator of any game room shall comply with all provisions of law, ordinance, rule or regulation relating to the conduct of business and the use and maintenance of the premises.

C. The owner and operator of any game room shall cause the game room license to be posted at all times in a conspicuous place on the premises.

D. The owner and operator of any game room shall not permit a greater number of persons on the premises at any time than the capacity approved by the Village Board as set forth in the license.

E. The owner and operator of any game room shall maintain good order on the premises at all times. The lack of good order on the premises shall include but not be limited to the following:

1. Fighting and rowdy behavior.

2. Possession or consumption of alcoholic beverages, except upon premises licensed for on-premises consumption by the State.

3. Gambling.

F. The owner and operator of any game room shall not permit a coin-controlled amusement device therein to be played or operated after 10:00 p.m. by a person under the age of fifteen (15), unless accompanied by and under the supervison of a parent.

G. The owner or operator of a game room shall not allow it to be open or used unless it is under the control and supervision of a person at least eighteen years of age who shall ensure that it is operated in compliance with this local law.

H. No game room containing more than ten (10) coin-controlled amusement devices shall be open or used unless staffed by at least one person for each ten games or fraction thereof.

I. The owner and operator of any game room shall provide at least twelve (12) square feet of floor space within the game room for each coin-controlled amusement device.

Section 6. Fees.

A. An application for a game room license shall be accompanied by a fee of $100.00. If a license is denied, seventy-five percent (75%) of said fee shall be returned to the applicant.

B. The annual fee for a game room license shall be One Hundred Dollars ($100.00) per device, but in no event shall said fee exceed Fifteen Hundred Dollars ($1,500.00). Each license shall expire on the 31st day of December next succeeding the date of issuance.

C. The fees fixed herein may be modifed or changed from time to time by resolution of the Board of Trustees of the Village.

Section 7. **Inspection** — Any duly authorized employee of the Village bearing proper credentials and identification shall be permitted to enter all properties for the purpose of inspection and observation as to compliance with this local law.

Section 8. **Penalties.**

A. Any person who shall permit the operation of a game room without first obtaining the required license therefor shall be in violation of this local law, shall be given written notice of the requirements hereunder, and shall be advised to cease and desist from use of the device or devices until such time as a proper license shall be obtained.

B. Any person who shall continue any violation of this local law shall be guilty of a violation and upon conviction thereof shall be fined in an amount not exceeding five hundred dollars ($500.00). Each day in which any such violation shall continue shall constitute a separate violation.

Section 9. Repealer — This local law shall supersede all prior local laws, ordinances, rules and regulations relative to the licensing of game rooms, and they shall be null and void as of the effective date hereof.

Section 10. Partial Invalidity. If any clause, sentence, paragraph or part of this local law or application thereof to any person or circumstances shall be adjudged by any court to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof or the application thereof to other persons and circumstances but shall be confined to its operation to the clause, sentence, paragraph or part thereof and the persons and circumstances directly involved in the controversy in which the judgment shall have been rendered.

Section 11. Effective Date.

A. This local law shall take effect immediately upon its being duly filed in the Offices of the Secretary of State and State Comptroller.

B. Persons operating game rooms as of the effective date of this local law shall not possess a license as of said date shall have until [July 1], 19[82] to operate such game rooms after which they shall be subject to all the provisions of this local law.

PUBLISHED BY ORDER OF THE BOARD OF TRUSTEES OF THE VILLAGE OF KENMORE, N.Y.

Phyllis G. Higgins
Village Clerk/Treasurer

Dated: September 23, 1981
Published: September 30, 1981

EXHIBIT C OF COMPLAINT: ARTICLE X-A, VILLAGE OF KENMORE ZONING ORDINANCE

LOCAL LAW INTRODUCTORY NO. 3 ENTITLED "AN ACT TO AMEND THE ZONING ORDINANCE OF THE VILLAGE OF KENMORE BY ADDING A NEW ARTICLE X-A THERETO"

BE IT ENACTED BY THE BOARD OF TRUSTEES OF THE VILLAGE OF KENMORE, as follows:

Section 1. The Zoning Ordinance of the Village of Kenmore is amended by adding thereto a new Article X-A, reading as follows:

ARTICLE X-A
ADULT USES

Section I. PURPOSES

Buildings and establishments operated as adult uses are detrimental and harmful to the health, safety, morals and general welfare of a community. In order to promote the health, [sic] safety, morals and general welfare of the residents of the Village of Kenmore, this Article is intended to restrict adult uses to non-residential, non-business and non-commercial areas of the Village, and otherwise regulate their operation. Moreover, in that the operational characteristics of adult uses increase the deleterious impact on a community when such uses are concentrated, this Article is intended to promote the health, safety, morals, general welfare, and good order of the residents of the Village of Kenmore by regulating the concentration of such uses.

Section II. DEFINITIONS

As used in this Article, the following terms shall have the meanings indicated:

(a) Adult Bookstore — an establishment having as a substantial or significant portion of its stock-in-trade books, magazines, films

for sale or viewing on premises, by use of motion picture devices or any other coin-operated means and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas or an establishment with a segment or section devoted to the sale or display of such material.

(b) Adult Entertainment Cabaret — a public or private establishment which is licensed to serve food and/or alcoholic beverages, which features topless dances, strippers, male or female impersonators or similar entertainers.

(c) Adult Mini-Motion-Picture Theatre — an enclosed building with a capacity of less than fifty (50) persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

(d) Adult Motion-Picture Theatre — an enclosed building with a capacity of fifty (50) or more persons used regularly and routinely for presenting material having as a dominant theme material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

(e) Person — any person, firm, partnership, corporation, association, or legal representative, acting individually or jointly.

(f) Specified Anatomical Areas:

1. Less than completely and opaquely covered human genitals, pubic region or female breast below a point immediately above the top of the areola.

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(g) Specified Sexual Activities:

1. Human genitals in a state of sexual stimulation or arousal.

2. Acts of human masturbation, sexual intercourse or sodomy.

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

Section III. RESTRICTIONS AFFECTING ADULT USES

Adult uses, including but not limited to adult bookstore, adult motion-picture theatre, adult mini-motion-picture theatre, and adult entertainment cabaret shall be permitted subject to the following restrictions:

(a) No such adult uses shall be allowed within five hundred (500) feet of another existing adult use.

(b) No such adult use shall be located within twenty-five (25) feet of the boundaries of any zoning district which is zoned exclusively for residential use (those zones designated Residential 1, 2 or 3).

(c) No such adult use shall be located within five hundred (500) feet of a pre-existing school or place of worship.

(d) No such adult use shall be located in any zoning district except the Industrial Use District.

Section IV. REGISTRATION

(a) The owner of a building or premises, his agent for the purpose of managing or controlling or collecting rents or any other person managing or controlling a building or premises, any part of which contains an adult use, shall register the following information with the Village Clerk of the Village of Kenmore:

1. The address of the premises.

2. The name and address of the owner of the premises and the names and addresses of the beneficial owners if the property is in a land trust.

3. The name of the business or the establishment subject to the provisions of this Article.

4. The name(s) and address(es) of the owner, beneficial owner of the major stockholder(s) of the business or the establishment subject to the provisions of this Article.

5. The date of initiation of the adult use.

6. The nature of the adult use.

7. If the premises or building is leased, a copy of said lease.

(b) It is a violation of this Article for the owner or person in control of any property to establish or operate thereon or to permit any person to establish or operate thereon an adult use without having properly registered said adult use with the Village Clerk.

Section V. DISPLAY OF COPY OF REGISTRATION

The owner, manager or agent of a registered adult use shall display in a conspicuous place on the premises of the adult use a copy of the registration filed with the Village Clerk.

Section VI. PROHIBITION REGARDING PUBLIC OBSERVATION

No adult use shall be conducted in any manner that permits the observation of any material depicting, describing or relating to specified sexual activities or specified anatomical areas from any public way or from any property not registered as an adult use. This provision shall apply to any display, decoration, sign, show window or other opening.

Section VII. SPECIAL USE PERMIT

(a) No use as described in this Article shall be established until the issuance of a special use permit by the Board of Trustees of the Village. Application for such a special use permit shall be in writing to the Board of Trustees and shall consist of a description of the premises for which the permit is sought, a plain and concise statement of the use which is proposed and such additional information as shall be required by the Board of Trustees. The Board of Trustees shall call a public hearing for the purpose of consider-

ing the request for a special use permit. At least ten (10) days notice of the time and place of public hearing shall be given by the publication of a notice in a newspaper of general circulation in the Village indicating the general nature of the public hearing and the fact that those persons interested therein may be heard at the time and place of such hearing.

(b) A special use permit issued under the provisions of this section shall not be transferable.

Section 2. This local law shall take effect immediately.

PUBLISHED BY ORDER OF THE BOARD OF TRUSTEES OF THE VILLAGE OF KENMORE.

Phyllis G. Higgins
Village Clerk-Treasurer

DATED: December 5, 1979

PUBLISH: December 12, 1979

EXHIBIT D OF COMPLAINT:
MEMORANDUM DECISION OF HON. JOSEPH D. MINTZ, DATED MAY 1, 1980

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CLOUD BOOKS, INC. d/b/a VILLAGE BOOK AND NEWS STORE

Plaintiff

vs.

ELMER ARNET, CHIEF OF POLICE OF THE VILLAGE OF KENMORE, and PHYLLIS G. HIGGINS, VILLAGE CLERK FOR THE VILLAGE OF KENMORE, and THE VILLAGE OF KENMORE

Defendants

LIPSITZ, GREEN, FAHRINGER, ROLL SCHULLER & JAMES
Attorneys for Plaintiff

PAUL CAMBRIA, ESQ
Of Counsel

RICHARD H. MURPHY, ESQ
Attorney for Defendants

MEMORANDUM

MINTZ, J.

This is an action for declaratory and permanent injunctive relief.

Plaintiff corporation is engaged in the business of selling various reading materials and exhibiting sexually explicit motion picture films through the use of coin-operated motion picture machines. On or about 4/9/80 Village authorities entered plaintiff's establishment and de-activated the machines on the basis that the operation of said machines was in violation of the Village ordinance entitled, "Licensing Coin-Controlled Amusement of Vending Devices not in violation of Law", due to the fact that a license had not been obtained as provided thereunder. Plaintiff obtained a temporary restraining order and commenced the instant action to declare the licensing ordinance unconstitutional on its face and void as amounting to an impermissible curtailment of the freedoms protected by the 1st and 14th Amendments and corresponding provisions of the NYS Constitution and likewise for a permanent injunction to enjoin the enforcement thereof.

An injunction will issue to the extent that a plaintiff shows a likelihood of success on the merits of the main claim, irreparable injury absent the granting of an injunction and no adequate remedy at law. Siegel, NY Practice § 328 (1978). As regards the first requirement, there is presented a serious question as to the constitutionality of the licensing ordinance which defendants seek to enforce.

Questions involving the content of the films and whether the same are obscene or not, are not before this Court and therefore not decided. The sole focus of the Court is whether the provisions of the licensing ordinance grants unbridled authority to administrative officials without the requisite standards of enforcement such as to render it constitutionally infirm.

The exhibition of motion pictures by means of coin-operated projection machines is a type of expression guaranteed by the 1st Amendment. *414 Theatre Corp. v. Murphy*, 360 F Supp 34 (SDNY 1973) affd. 499 F 2d 1153 (2nd Cir. 1974). *City of N.Y. v. S & H Bookshop*, 41 AD2d 637, 341 NYS2d 292 (1st Dept. 1973). It is settled that a law subjecting the exercise of 1st Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional. *People v. Calub*, ____M2d____, 421 NYS2d 289 (1st Dept. 1979), citing *Shuttlesworth v. Birmingham*, 394 US 147. Indeed, licensing ordinances which afford unfettered au-

thority to municipalities to restrict and otherwise interfere with 1st Amendment rights do not constitute a legitimate exercise of police power, *People v. Calub*, supra, citing *Staub v. Basley* 355 US 313. Here, the ordinance violates the 1st and 14th Amendments in that, it vests unlimited discretion in the hands of the Police Chief and Village Clerk to grant, deny or revoke the right to exhibit expression that is protected by the 1st Amendment and concomitantly fails to set forth specific standards and/or guidelines upon which the authorities can base their determinations in the exercise of their discretion.

Furthermore, the unconstitutional infringement of 1st Amendment freedoms constitutes irreparable injury sufficient to warrant the issuance of an injunction. *99 State St. Bookstore Inc. et al v. Hastings*, (WDNY Mar. 24, 1980).

Moreover, there exists no adequate remedy at law in that, an award of money damages would not determine the constitutional rights of the plaintiff, so as to give notice in the future relative to the scope of permissible conduct.

Therefore, this Court finds the Village Ordinance herein at issue unconstitutional on its face, and grants the issuance of an injunction restraining its enforcement as against the plaintiff.

Dated: Buffalo, New York
May 1st, 1980

/s/ _____
J. Mintz
SUPREME COURT JUSTICE

SUPREME COURT

CLOUD BOOKS, INC. d/b/a VILLAGE BOOK AND NEWS STORE

Plaintiff

vs.

ELMER ARNET, CHIEF OF POLICE OF THE VILLAGE OF KENMORE, and PHYLLIS G. HIGGINS, VILLAGE CLERK FOR THE VILLAGE OF KENMORE, and THE VILLAGE OF KENMORE

Defendants

Memorandum by MINTZ, J.

EXHIBIT E OF COMPLAINT:
ORDER OF JUSTICE MINTZ, ENTERED MAY 28, 1980

At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie at the Courthouse in the City of Buffalo, New York, on the 18th day of April, 1980.

PRESENT: HONORABLE JOSEPH D. MINTZ
Justice Supreme Court

SUPREME COURT
STATE OF NEW YORK: COUNTY OF ERIE

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOK AND NEWS STORE
3102 Delaware Avenue
Buffalo, New York,

Plaintiff,

vs.

ELMER ARNET, Chief of Police of the Village of Kenmore, and PHYLLIS G. HIGGINS, Village Clerk for the Village of Kenmore, and THE VILLAGE OF KENMORE,

Defendants

JUDGMENT AND ORDER

Upon the Order To Show Cause, the affidavit, summons and verified complaint of Robert Kenwith, and the exhibits attached thereto, all dated April 11, 1980 and the Answering Affidavit submitted on behalf of all the defendants, dated April 17, 1980 and upon all the proceedings, and it appearing that Paul J. Cambria, Jr., having appeared for the plaintiff in support of the motion and other requested relief, and Richard H. Murphy, Village Attorney for the Village of Kenmore, having appeared for the defendants, and the Court having rendered its decision in writing on or about May 1, 1980, it is

ORDERED AND ADJUDGED, that Section 5 of the Village of Kenmore Ordinances which is entitled "Licensing of Coin-Controlled Amusement Devices not in Violation of Law", is hereby declared, decreed and adjudged unconstitutional, invalid and otherwise of no legal force or effect and it is further

ORDERED AND ADJUDGED, that the defendants herein are hereby permanently enjoined, restrained and otherwise prevented from in any enforcing or attempting to enforce all or any part of these ordinances.

/s/ _____
J.S.C.

GRANTED
ENTER MAY 28 1980
/s/ _____
Court Clerk

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOK AND NEWS STORE
3102 Delaware Avenue
Buffalo, New York,

Plaintiff

vs.

ELMER ARNET, Chief of Police of the Village of Kenmore, and PHYLLIS G. HIGGINS, Village Clerk for the Village of Kenmore, and THE VILLAGE OF KENMORE,

Defendants

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES
Attorneys for Plaintiff
Office and Post Office Address
One Niagara Square
Buffalo, New York 14202
Phone: 849-1333

Personal Service of the within ____ and of the notice (if any) hereon endorsed, is admitted this ____ day of ____ 19____

Sir: Please take notice that an _____ of which the within is a copy, was duly granted in the within entitled action on the ____ day of ____ 19____, and duly entered in the office of the Clerk of the County of _____ on the ____ day of ____ 19____

EXHIBIT F OF COMPLAINT: LOCAL LAW NO. 5 OF 1980, VILLAGE OF KENMORE

Adopted July 15, 1980
Eff. July 22, 1980

LOCAL LAW NO. 5 of 1980 entitled

A LOCAL LAW TO PROVIDE FOR THE LICENSING OF COIN-CONTROLLED AMUSEMENT OR VENDING DEVICES

BE IT ENACTED BY THE BOARD OF TRUSTEES OF THE VILLAGE OF KENMORE, NEW YORK, as follows:

Section 1. Purpose and Intent — It is the purpose of this local law to provide for the licensing of coin-controlled amusement or vending devices located within the Village of Kenmore, for the procedures to be followed with respect to administration of this law, and for the fees to be collected in connection therewith. In enacting this local law, the Board of Trustees finds that the licensing of the foregoing devices and the production of revenue thereby is in the best interest of the Village of Kenmore, promotes the good government of the Village, its management and business, and preserves the property and general welfare of the inhabitants of the Village.

Section 2. Definitions — As used in this local law, the following terms shall have the meanings indicated:

A. Person — one or more indivisuals, a partnership, an unincorporated association, or a domestic or foreign corporation.

B. Coin-controlled amusement or vending device — any mechanical device used or designated to be used, for amusement or entertainment purposes, or for the vending of personal property operated or controlled through the insertion of a coin or coins including, but not limited to, mechanical games known as bagatelle, baseball, football, foosball, pinball, bowling, hockey, soccer, shuffleboard, jukeboxes and other coin-operated musical de-

vices, movie machines, and machines designed to vend cigarettes, ice, food and drink of any kind and sundries.

C. Owner — a person who is the record owner, contract purchaser, receiver, assignee, lessee or bailee of one or more coin-controlled amusement or vending devices.

Section 3. Licensing — No person shall place, deliver for use, permit the use, or use any coin-controlled amusement or vending device on any premises within the Village of Kenmore, whether or not such premises are under the control of such person, without a license to do so having first been obtained from the Village as hereinafter provided.

Section 4. Administration

A. The owner of one or more coin-controlled amusement or vending devices or the authorized agent of such owner, desiring to place, deliver for use, permit the use, or use such device or devices shall make and submit an application to the Clerk/Treasurer's Office of the Village for a license permitting such use. Said application shall be made on a form supplied by the Village, signed by the applicant and shall require the following information:

1. Name and address of the owner.

2. Number of devices for which application is being made.

3. A description of the device or devices, including the name of the manufacturer serial number if any, and its general mechanical features.

4. Name and address of the person having charge of the device or devices.

5. Name and address of the person having charge of the premises upon or at which the device or devices are to be located.

6. Address of the premises upon or at which the device or devices are to be located.

B. Upon receipt of the completed and signed application and upon receipt of the requisite license fee computed pursuant to the

schedule of fees in effect at the time of application, the Clerk-Treasurer's Office shall issue the license permitting use of the coin-controlled amusement or vending device or devices. In the event that the application was made on more than one device, the Clerk-Treasurer's Office shall issue a license for each device. Such license or licenses, as the case may be, shall be conspicuously displayed by the owner at the premises where the device or devices are placed.

C. The Clerk-Treasurer's Office shall issue to the applicant a tag or tags bearing the same number as the license or licenses, as the case may be, which tag or tags shall be securely attached by the applicant to each device licensed.

D. No license or tag shall be transferred from one device to another or from one location to another.

E. The Clerk-Treasurer's Office shall issue no license for any coin-controlled amusement or vending device which shall be prohibited from use by the laws of New York such as a gambling device or slot machine.

Section 5. Fees

A. The required license fees for each coin-controlled amusement or vending device shall be as follows, the sum of $50.00 per annum per device plus the sum of $1.00 for each tag.

B. Each license and corresponding tag shall expire on the 31st of December next succeeding the date of issuance at which time the annual fee shall be paid to the Clerk-Treasurer's Office.

C. The fees fixed herein may be modified or changed from time to time by resolution of the Board of Trustees of the Village.

Section 6. Inspection

Any duly authorized employee of the Village bearing proper credentials and identification shall be permitted to enter all properties for the purpose of inspection and observation as to compliance with this local law.

Section 7. Penalties

A. Any person who shall permit the use of a coin-controlled amusement or vending device without first obtaining the required license therefor shall be in violation of this local law, shall be given written notice of the requirements hereunder, and shall be advised to cease and desist from use of the device or devices until such time as a proper license shall be obtained.

B. Any person who shall continue any violation of this local law shall be guilty of violation with respect to each device and on conviction thereof shall be fined in an amount not exceeding Twenty-five Dollars ($25.00) for each violation. Each day in which any such violation shall continue shall constitute a separate violation.

Section 8. Repealer

This local law shall supercede all prior local laws, ordinances, rules and regulations relative to the licensing of coin-controlled amusement or vending devices, and they shall be null and void as of the effective date hereof.

Section 9. Partial Invalidity

If any clause, sentence, paragraph or part of this local law or application thereof to any person or circumstances shall be adjudged by any court to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof or the application thereof to other persons and circumstances but shall be confined to its operation to the clause, sentence, paragraph or part thereof and the persons and circumstances directly involved in the controversy in which the judgment shall have been rendered.

Section 10. Effective Date

A. This local law shall take effective immediately upon its been duly filed in the Offices of the Secretary of State and State Comptroller.

B. Persons using a device or devices as of the effective date of this local law who shall not possess a license as of said date shall have thirty (30) days after said date to obtain the license or licenses required under this local law.

PUBLISHED BY ORDER OF THE BOARD OF TRUSTEES OF THE VILLAGE OF KENMORE

Phyllis G. Higgins
Village Clerk-Treasurer

Dated: May 21, 1980
Publish: May 28, 1980

EXHIBIT G OF COMPLAINT:
1981 LICENSE APPLICATION FORM OF PLAINTIFF

VILLAGE OF KENMORE
NEW YORK

APPLICATION FOR COIN-CONTROLLED AMUSEMENT OR VENDING DEVICE LICENSE PURSUANT TO THE PROVISIONS OF SECTION 5A OF THE ORDINANCES OF THE VILLAGE OF KENMORE.

ANNUAL LICENSE FEES (due Jan. 1st.)

Cigarette or Coffee-Vending Device.....$25 plus $1 Tag
Milk Vending or Soft Drink Device.....$25 plus $1 Tag
Vending Device Other Than Above.....$50 plus $1 Tag
Coin-controlled Amusement Device.....$50 plus $1 Tag
Juke Box.....$25 plus $1 Tag

Date 12/19/80

To the Mayor, Kenmore, N.Y.

The undersigned, being an owner of a coin-controlled amusement or vending device, hereby applies for a license and makes the following statements:

1. Name of owner is Cloud Books, Inc.

2. Address of Owner is 3102 Delaware Avenue, Kenmore, NY 14217

3. Located on premises known as No. Village Books and News

4. Name of Person having charge, if other than owner None (in case of any question, contact Paul Cambira, Jr. 716-849-1333.

5. List Each Device and Type, plus Serial Numbers and Name of Manufacturer. (If more space is needed, list on back)

Type — 1023-1036; Booth; Serial Number 001A-0014A; Fee 1428.00

Type — 037-1050; Serial Number 001B-0014B.

6. If a vending machine(s), the product(s) is (are) N/A

/s/ CLOUD BOOKS
OWNER

State of Ohio
County of Cuyahoca

CLOUD BOOKS, INC., being duly sworn, deposes and says that he is owner above named; that he has read the foregoing application and known the contents thereof; that the statements therein made are true.

by: /s/ Robert Kenworth
Owner

Subscribed and sworn to before me this 10th day of January 1981.

/s/ _____
Notary Public

RECEIVED JAN 28 1981 $1,428.00 CK VILLAGE OF KENMORE

EXHIBIT H OF COMPLAINT:
1982 LICENSE APPLICATION FORM OF PLAINTIFF

VILLAGE OF KENMORE
KENMORE, N.Y.

APPLICATION FOR COIN CONTROLLED AMUSEMENT DEVICE(S) PURSUANT TO THE PROVISIONS OF LOCAL LAW NO. 5 OF 1980 AS AMENDED OF THE VILLAGE OF KENMORE.

ANNUAL LICENSE FEE (DUE JANUARY 1ST) $50.00 + $1.00 Tag per device

The Undersigned, hereby applies for a license and makes the following statement:

NAME OF OWNER (AGENT) Cloud Books Inc.; S.S. NO. N/A; ADDRESS 3102 Delaware Avenue, Kenmore, N.Y. 14217; DATE OF BIRTH N/A; TEL. NO. N/A; LOCATED ON PREMISES KNOWN AS Village Books and News; NAME OF PERSON HAVING CHARGE (see attached sheet)

If the foregoing are a partnership, unincorporated Assoc., firm or corporation, the names of the officers, members, directors or holders thereof together with their addresses, social security numbers, date of births, and telephone numbers must be attached to this application. (See attached sheet)

Note:

(a) As to each person whose name appears on this application; the fact of conviction of any jurisdiction of felony (related to gambling or obscenity) with a full disclosure of the offense, time and place of commission, legal proceedings, and penalty imposed. (See attached sheet).

(b) As to each person whose name appears on this application; his fingerprints for the purpose of expediting the investigation of said application. (See attached shet.)

NUMBER OF DEVICES 28. List each device, manufacturer, Serial Number and fee.

NAME	MANUF.	SERIAL NO.	FEE
Film Booth	1023 - 1036	001A - 0014A	$714.00
Film Booth	1037 - 1050	001B - 0014B	$714.00
		TOTAL	$1,428.00

FOR GAME ROOMS: List additional machines on back of application.

Note: Please notify Clerk/Treasurer's office if a machine is removed or replaced and provide new information as outlined above within five days of transfer.

State of Ohio
County of Cuyahoga

Cloud Books, Inc., being duly sworn, deposes and says that he is the above named; that he has read the foregoing application and knows the contents thereof; that the statements therein made are true.

by: /s/ Robert Kenworth
Agent or Owner
President

Subscribed and sworn to before me this 10th day of February 1982.

/s/ _____
Notary Public

VILLAGE OF KENMORE
KENMORE, N.Y.
APPLICATION FOR COIN CONTROLLED AMUSEMENT DEVICE(S)

The person (persons) having charge of premises decline to answer since disclosure of information would violate rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution as well as all corresponding provisions of the New York State Constitution.

NOTE: All questions and communications regarding this application or the operation of the Village Book and News Store vis-a-vis ordinances of the Village of Kenmore or the laws of the State of New York ought be directed to Lipsitz, Green, Fahringer, Roll, Schuller & James, One Niagara Square, Buffalo, New York, 14202, Attn: Paul J. Cambria, Jr., (716) 849-1333.

The person(s) whose name(s) appear on this application decline to sut mit their fingerprints under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution as well as all corresponding provisions of the New York State Constitution.

Further, the applicant declines to provide the information required on the grounds that such disclosure and submission of fingerprints would be violative of his rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution as well as all corresponding provisions of the New York State Constitution.

EXHIBIT I OF COMPLAINT:
RESPONSIVE LETTER REGARDING 1982 APPLICATION

Lipsitz, Green, Fahringer, Roll, Schuller and James,
One Niagara Square
Buffalo, New York 14202

Attn: Paul J. Cambria, Jr.:

Re: Cloud Books, Inc., 3102 Delaware Avenue, Kenmore, N.Y.

Re: Application for Coin-Controlled Amusement Device License

Dear

Please be advised that your application for a coin-controlled amusement device licens- is incomplete as filed. Until the application is complete it cannot be processed by this office.

You have previously been granted an extension of time to submit your application. Such extension will be further extended until March 8, 1982.

The information to be submitted to complete your application is listed below for your convenience. Please submit the requisite items by the above date or the application will have to be denied on the ground of being incomplete.

Contact this office should you have any questions.

Very truly yours,

/s/ (Mrs.) Phyllis G. Higgins
Village Clerk-Treasurer

PGH/hk

Note: Fingerprints of persons having charge of 28 movie machines.

EXHIBIT J OF COMPLAINT:
NOTICE REGARDING ANNUAL FEE
FOR AMUSEMENT AND VENDING LICENSES

TO WHOM IT MAY CONCERN:

Enclosed please find an application for the licensing of coin operated devices in the Vilage of Kenmore.

ANNUAL LICENSE FEES

Cigarette or Coffee-Vending Device .....$25 + $1 Tag
Milk Vending or Soft Drink Device .....$25 + $1 Tag
Vending Device Other Than Above.....$50 + $1 Tag
Coin-Controlled Amusement Device .....$50 + $1 Tag
Juke Box .....$25 + $1 Tag

If the machines on your premises are not owned by you, you are nevertheless responsible to file the application and remit the fee.

The application and license fee is returnable on or before January 1st, 1982 at the Village Clerk's office, Room 17, Municipal Building.

Very truly yours,

/s/ (Mrs.) Phyllis G. Higgins
Village Clerk-Treasurer

PGH/hk
Enc.

NOTE: Call the Detective Bureau at 875-1234 for an appointment for fingerprinting.

CLOUD BOOKS, INC. d/b/a
VILLAGE BOOK AND NEWS STORE
3102 Delaware Avenue
Kenmore, New York 14217,

Plaintiff,

vs.

VILLAGE OF KENMORE:
VILLAGE OF KENMORE POLICE DEPARTMENT:
ET AL.

Defendants.

SUMMONS AND VERIFIED COMPLAINT

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CLOUD BOOKS, INC. d/b/a VILLAGE BOOK AND NEWS STORE

Plaintiff

vs.

VILLAGE OF KENMORE; VILLAGE OF KENMORE POLICE DEPARTMENT; ELMER ARNET, Police Chief for the Village of Kenmore; PHYLLIS G. HIGGINS, Village Clerk-Treasurer, Village of Kenmore; DANIEL MARTIN, Building Inspector for the Village of Kenmore; ARTHUR A. NIST, Mayor of the Village of Kenmore; MURIEL H. MARCUS, Deputy-Mayor of the Village of Kenmore and Member of the Village of Kenmore Board of Trustees; EDMUND J. O'GRADY; CHARLES J. SOTTILE, PAUL A. BILLONY, Board of Trustees, Village of Kenmore,

Defendants

Dated: May 18, 1982

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES
By /s/ PAUL J. CAMBRIA, JR., Esq.,
Attorneys for Plaintiff
One Niagara Square
Buffalo, New York 14202

MOOT & SPRAGUE
By /s/ WILLIAM R. BRENNAN, Esq.
Attorneys for defendants
2300 Main Place Tower
Buffalo, New York 14202
(716) 845-5200

STIPULATION OF DISCONTINUANCE

Index No. H238

1982 JUNE 30 AM 11:54
FILED
ERIE COUNTY
CLERK'S OFFICE

IT IS HEREBY STIPULATED that this action be and hereby is discontinued, on the merits, upon the following terms and conditions:

1. Plaintiff will pay the licensing fees required by §5 of Village of Kenmore Local Law No. 5 of 1980, as amended October 6, 1981 and November 3, 1981, entitled "A Local Law to Provide for the Licensing of Coin-Controlled Amusement or Vending devices" (hereafter referred to as the "LICENSING ORDINANCE");

2. Plaintiff will make the disclosures required by §4(A)(1) (first sentence only), (2),(3),(4) and (5) of the LICENSING ORDINANCE for each coin-controlled amusement device, including coin-controlled motion picture machines, which it operates.

3. Except for the above-mentioned provisions, no portion of the LICENSING ORDINANCE, and no portion of the GAME ROOM ORDINANCE (Local Law No. 5 of 1981, as amended November 3, 1981, entitled "An Act to Provide for the Licensing of Game Rooms") shall be deemed applicable to plaintiff for as long as it continues to engage in its present use of the Village Book & News Store at 3102 Delaware Avenue in the Village of Kenmore;

4. No party shall be entitled to an award of costs, disbursements or attorneys' fees from any other party.

AFFIDAVIT OF MORTON MEYERS

STATE OF NEW YORK)
COUNTY OF ERIE)
CITY OF BUFFALO)

MORTON MEYERS, JR., being duly sworn deposes and says:

1. I have been retained by PAUL J. CAMBRIA, JR., ESQ., for the specific purpose of determining whether or not there is currently existing a retail business premise or comparable facility to that currently occupied by the Village Book & News Store located at 3102 Delaware Avenue in the Village of Kenmore. I have been informed that this is an adult use as defined under Local Law No. 5 Article X-A. and based upon this definition I have discovered no other such adult uses within the Village of Kenmore.

2. Upon my personal observation of the premises located at 3102 Delaware Avenue, I have determined that this retail premise is located in a primarily retail store area where other occupants offer a traditional variety of retail goods and services. The store is located on the main thoroughfare in the Village of Kenmore, and is surrounded by restaurants, taverns, and a variety of other retail establishments. The Village Book & News Store has an entrance at ground level, and large windows in the front of the building which permit patrons to observe what appears to be traditional news stand fare. Prominently displayed in the front of the building is a sign indicating that its patronage is restricted to individuals 21 years of age and older. I could at no time observe any sexually offensive depictions or descriptions while standing on the sidewalk and viewing the premises from the outside.

3. I have been informed that due to a variety of enactments by the Village legislature, so-called "adult uses" are now restricted to Military Road within the Village and in the case of a "game room", such uses are restricted to Kenmore Avenue and Military Road except only Military Road where adult movies are shown.

4. I have conducted an exhaustive search of Kenmore Avenue and Military Road to determine whether or not any comparable facilities to those currently occupied by the Village News & Book Store are available for either purchase or lease. My conclusion is that no such establishments are currently available, nor does it appear that any such establishments are likely to be available in the future and especially without significant renovation or alteration of premises.

5. I am currently a licensed real estate broker, and have been for a period in excess of 20 years. I have as well conducted appraisal services during this period of time. I am the past Vice-President of the Greater Buffalo Board of Realtors and I currently hold a Directorship in that organization. My concentration has been in the field of commercial real estate, and this has included a significant amount of work in the Kenmore Town of Tonawanda area.

6. Beginning with Military Road, my findings as to the lack of suitable locations comparable to that currently occupied by the Village Book & News Store consisted of the following:

a. On the West side of Military Road, no improved property is available. All such properties are currently occupied by comparatively large users of space and involve buildings with more than 10,000 square feet of useable space. These properties are primarily devoted to manufacturing, warehousing or truck terminal types of businesses.

b. On the East side between Kenmore Avenue on the South and Mayville Avenue of the North, all improved properties except for one are currently occupied and represent a mixture of uses by the present occupants.

c. There are no properties which are available for lease, and of the three available for sale, two are occupied and one is vacant, however, they are unacceptable and certainly not comparable to the Village Book & News Store premises for a variety of reasons.

For example, one property includes a masonry structure containing approximately 4,100 square feet with approximately 100 square feet of office space and the balance being warehouse-type area. This property, of course, is much larger than the 3102 Delaware Avenue premises, and is not situated in any fashion comparable to the Village Book & News Store, nor is it surrounded by any other comparable retail establishments. In short, any attempt to convert this premise into something resembling the 3102 Delaware Avenue premises would be prohibitive in cost, and not feasible from the standpoint of attempting to achieve a relatively similar retail environment as that currently enjoyed by the Village Book & News Store.

d. Of the two remaining occupied properties, one consists of a 2 1/2 story frame structure presently occupied by a tavern on the first floor and an apartment on the second floor. The size of this premise is excessive for purposes of the usage currently in existence at 3102 Delaware Avenue, and its price currently listed at $147,500.00 does not make it viable as a retail outlet such as the Village Book & News Store. Indeed the rather high sale price coupled with the extensive renovation which would be necessary in order to attempt to physically duplicate the facilities of 3102 Delaware Avenue renders this property unacceptable from a commercial standpoint as a viable substitute. Additionally, even with extensive renovation, the retail setting currently enjoyed by the Village Book & News Store could not, in my opinion, be duplicated with any degree of success.

e. The last remaining occupied premise on Military Road consists of a 2 1/2 story frame structure presently occupied as a restaurant on the first floor and an apartment on the second floor. This premise, however, is in very poor condition and reflects a considerable amount of deferred maintenance. Also the size of this property is inadequate for the usage currently housed at the 3102 Delaware Avenue premises. Thus, not only would extensive and costly repairs have to be performed to the basic structure, but in addition, a good deal of structure alteration would be necessary

in order to attempt to convert this premise into a retail outlet in some way comparable to that of the Village Book & News Store, especially in view of its rather limited floor space which as indicated is not on one level but on two different levels. Of course, as in the case of the other locations on Military Road, there is no viable way of converting this premise in such a manner as to duplicate or approach the retail commercial atmosphere currently enjoyed by the Village Book & News Store. The improved properties on the East side of Military Road in addition to those detailed above consist of the following:

Address	Occupant	Use
787	Bennions Place	Tavern
797	Glaser Corp.	Power Plant Equipment Service
803	First Bible & Baptist Church	Church
827	White Tower	Restaurant
837	Hat Trick Tavern	Tavern
861	Military Grill	Restaurant
877	Dennis Transmission	Auto Repair
889	D & M Guard Company	Safety Device Manufacturing
897	1 1/2 Store Frame House	Residence
917	Advance Training Center	Welding School
941-955	Niagara Gear Corp.	Machine Shop
977	Awald Chevrolet	Auto Repair
1011	Armento, Inc.	Ornamental Metal Work Mfg.
1049	DeGeorge Ceiling	Ceiling Installation Serv.
1069	Mandell Iron Works	Iron Work Manufacturing
1085	Rockelman Appliance	Appliance Service
1099	Kenmore Auto Glass	Auto Repair
1101	Wendover Collision	Auto Repair
1109	Sam Martin Painting	Painting Service
1129	2 1/2 Store Frame House	Residence
1141	The Hour Grill	Restaurant
1159	The Grand Prix Garage	Auto Repair Service

f. As to prospective locations on Kenmore Avenue it is initially to be noted that so-called "adult uses" are not permitted on Kenmore Avenue and even if they were, my survey demonstrates that on Kenmore Avenue between Military Road on the West and South Irving Terrace on the East, there are no properties currently available which would be suitable both from the standpoint of economic feasibility, and duplication of the retail characteristics enjoyed by the store located at 3102 Delaware Avenue. If, however, an option for sale is not exercised as to the premises located at 1063 Kenmore Avenue, and therefore that property would become available (assuming, of course, the lessor would desire to rent it for the purpose of an "adult use") then there is a possibility that this space could be suitably converted however, without additional and detailed economic study including consultation with an appropriate contractor, an opinion as to the feasibility of this location cannot at this time be rendered.

7. In summary, it is my professional opinion that there are no currently available locations which could reasonably duplicate or serve as a substitute for the premises and retail environment presently enjoyed by the Village Book & News Store within the Village of Kenmore as confined by the Ordinances to Military Road and if permissible, Kenmore Avenue. Nor has my survey revealed the likelihood of any immediate change of these circumstances in the near future.

[Signature]
Morton Meyers, Jr.

SWORN TO BEFORE ME THIS
[17th] DAY OF MARCH, 1982
[Signature]
Notary Public
[Stamp]

REPLY

BRIEF

No. 85-437

In The

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD J. ARCARA, District Attorney of Erie County,
Petitioner,

vs.

CLOUD BOOKS, INC. etc., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

The statute under consideration is content neutral both on its face and in its application.

While attempting to convince this Court that the governmental purpose in initiating the instant action against the bookstore owners related to the content of the materials sold by the store, respondents candidly admit that "the illegal conduct alleged is separate from the legal and protected expression" in which they engage (Respondents' Brief, 23-24). Notably the Verified Complaint upon which this action is predicated enumerates *inter alia* multiple acts of masturbation committed in some instances within the view of teenagers, several offers to commit acts of fellatio for money, and the commission of an act of fellatio visible to other patrons (A55-A60). The sole reference to the content of

materials sold occurs in paragraph 11 of the complaint wherein it is alleged that the bookstore displays some publications of a clearly non-sexual nature in order to "induce the patronage of younger individuals" (A59).

Not only is the sexual content of books, films or magazines not presented as an issue or basis for complaint below, but the Public Health Law does not prohibit the dissemination of such materials even where they have been determined to be obscene. Rather, upon considerations of public health, the Article and Title at issue authorize injunction and closure only in response to the conducting or maintaining of a premises for purposes of "lewdness, assignation, and prostitution" (Art. 23, Title II, §2320, subd. 1).

The Court of Appeals acknowledged the inapplicability of the statute to control of content by stating:

> "Finally, the fact that defendant's bookstore is an 'adult' bookstore featuring sexually explicit material is by itself of no relevance, as nothing in Section 2320 supports the application of Title II to a premise based on the content of material sold or displayed there" (citations omitted) (A11).

Perhaps more importantly, the court in specific reference to the instant case noted that, "We do not agree, however, that the *mere fact that closure of defendant's bookstore would not be based on the content of any materials sold there* means that defendant's First Amendment rights would not be implicated" (emphasis added) (A15). This explicit recognition by the court confirms that the statute under scrutiny is unrelated to content control either on its face or in its application.

Significantly the court's position reflects the stance taken below by the respondents themselves. As conceded in their reply brief before the Court of Appeals, "This case is not about content control. Rather, it concerns the right of the state to impose a one-shot overkill penalty when a lesser measure would meet the alleged ill and not at the same time silence other lawful tones of

expression" (Reply Brief filed with the New York Court of Appeals for Appellant Cloud Books, Inc., 21-22). The Court of Appeals' conclusion that, "*the interest in restricting this conduct is clearly unrelated to the suppression of free expression*" (emphasis added) (A18) was perhaps in part a response to such admission. In view of this express determination, it is respondents who appear somewhat disingenuous in their attempt to shift the attention of this Court to an issue specifically rejected below. This is particularly the case where, as here, respondents endeavor to support their claim by newspaper articles and unrelated filings which are not properly a part of the record in this case.

While the community was no doubt concerned about the content of materials sought to be sold by respondents and the attendant impact upon their surrounding residential neighborhood, such concern did not and could not translate into a nuisance action under the Public Health Law. Inasmuch as the respondents have conceded for purposes of the motion for summary judgment the existence of the sexual acts documented by the Verified Complaint, they should not now be heard to complain that the nuisance action exists, "not because of the alleged sexual acts occurring [at the bookstore] but because Kenmore citizens want the store out of their community" (Respondents' Brief, 9). The legal viability of the action under consideration is dependent upon the sufficiency of the allegations of continuing illicit sexual conduct, not upon the subjective concerns of the community relative to the materials offered by respondents for sale.

II

Respondents are free to relocate their business operation in the event of closure.

By reference to materials which were not provided the court below, respondents contend that court ordered closure would leave them without an alternative situs from which they could continue their business operation, and that they are presently

faced with "no option but to remain at their present location" (Respondents' Brief, 11). Cited as support for this argument is a Village of Kenmore ordinance which, according to respondents, "limit[s] the presence of adult uses (which category includes adult bookstores) to one small unpopulated and industrialized area on the outskirts of the residential/business district of the village" (Respondents' Brief, 10).[1]

The claim that respondents are unable to relocate, and the materials in support of such claim, are presented for the first time in the course of the present litigation in respondents' brief on the merits and in respondents' appendix. As late as the filing of the brief in opposition to the petition for a writ of certiorari, the respondents remained complacent in their evaluation that while the possibility of relocation might exist it was of no moment to the present issue. As stated at page 8 of respondents' brief in opposition:

> "The District Attorney attempts to appease those who would retain a vigilant First Amendment watch: *the bookstore can relocate,* no one would complain if the property were subject to a tax foreclosure sale or its owner jailed for theft. Such comparisons are pointless and without logic. *As noted by the Court of Appeals, the feasibility of relocation is not only speculative but also, is an inadequate answer to the demands of the Constitution which does not condone the abridgement of free speech in an appropriate setting merely because an alternative locus is available.*" (emphasis added)

Apparently not presently convinced of the correctness of their earlier decision to waive any argument relative to their ability *vel non* to relocate, respondents now urge the impossibility of relocation as a matter significant to the resolution of the present is-

[1] Respondents' statement that the area is unpopulated is contradicted by the gratuitous affidavit of Morton Meyers, Jr. which is provided at page 96 of respondents' appendix. Further, the admitted existence of an adult use district in the Village of Kenmore serves to severely undercut respondents' assertion that they "have no option but to remain at their present location."

sue. Importantly, neither the Village of Kenmore Adult Uses Ordinance (RA 69 *et seq.*) nor the other materials provided in respondents' appendix support the conclusion that relocation of the bookstore is not a viable alternative for its owners. Kenmore, with a land area of 1.4 square miles[2] is, at its most expansive point, a ten by eighteen block village zoned for commercial, industrial and residential use. As the ordinance cited by the respondents (RA 69) as well as Exhibit A, here attached, indicate, there exists a reasonable and ample area set aside for adult uses in light of the Village's limited size. That some of the sites are presently occupied or would require a financial investment beyond that deemed desirable by the respondents, does not serve to establish an unavailability of alternate locations sufficient to support a legitimate First Amendment concern (*Renton v. Playtime Theatres,* 106 S.Ct. 925, 54 U.S.L.W. 4160, 4163).

Moreover, the Village of Kenmore exists wholly within the Town of Tonawanda, New York, a town with a land area of 20 square miles.[3] While Tonawanda has also zoned adult uses to certain areas (Exhibit B), it is clear from Exhibit C that such areas appear to be quite substantial in relation to the area included within the town's boundaries.

It remains true that enforcement of the closure provision of the Public Health Law would not, in and of itself, prevent the respondents from relocating "across the street from or next door to the premises which they would be forced to vacate" (Petitioner's Brief, 16). While independent regulations, i.e. the Village of Kenmore Adult Uses Ordinance or the Town of Tonawanda Adult Uses Ordinance, might require that such relocation be restricted to certain areas of the Village or Town, it is clear that ordinances of this nature have been held to be non-violative of the federal constitution (*See Young v. American Mini Theatres, Inc.,*

[2] 1960 Census, Bureau of Census, Department of Commerce.

[3] Id.

427 U.S. 50, 96 S.Ct. 2440, *Renton, supra*). In any event, the validity of the Kenmore and Tonawanda ordinances is not a question now before the Court.

Respondents' assertion that they have "no option but to remain at their present location" is simply unsupportable. There do exist other options; respondents need only be prepared to select one when, or if, closure is ordered.

III

The Closure Provision of the New York Public Health Law, Article 23, Title II, constitutes no regulation of speech or in the alternative is a valid time, place or manner restriction.

In asserting that closure is a constitutionally overbroad method of abating the nuisance at issue, respondents attempt to demonstrate that it would impose a prior restraint on the exercise of First Amendment rights or, in the alternative, that it would incidentally and impermissibly infringe upon free speech in violation of the standard established in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673.

As delineated in petitioner's opening brief, the concept of prior restraint is inapplicable under the circumstances of this case. Not only is the statute under consideration content neutral on its face, but its application is based solely upon non-expressive sexual conduct, not upon the content of any materials sought to be sold by the respondents. As noted in I above, this point was specifically conceded by the respondents below and subsequently assented to by the Court of Appeals. With respect to the question of access, the respondents, who would be excluded by operation of the statute from one site only, would not be denied the use of adequate, alternative sites as demonstrated in II above and Appendices A, B and C.

The respondents' incidental effect analysis similarly misperceives the essential thrust of this Court's First Amendment decisions. As observed in *Young, supra,* "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression" (427 U.S. at 78, 96 S.Ct. at 2456, Powell, J., concurring). Whether considered from the perspective of the respondents' right to communicate whatever messages or information they choose or from the public's right to access, it is clear that the statute under consideration does not abridge the right to freedom of expression.

As in *Young,* no message has been silenced, no censorship invoked, and, given the adequacy of alternative sites for the respondents' or for competitors' business operations, no limitation other than possible minor inconvenience has been imposed upon persons wishing to purchase sexually explicit fare. Indeed the sole incidental effect to which respondents can legitimately point is that which has been determined insufficient to justify a First Amendment inquiry, i.e. economic impact (*See also Renton, supra*).

In addition this case presents a unique situation in First Amendment litigation in that respondents' exercise or intended exercise of free speech rights can never trigger the operation of the statute. Irrespective of what type of First Amendment activity the respondents engage in, their speech related conduct will never result in the imposition of either closure or an injunction. It is this circumstance which distinguishes these cases from the situations presented in, for example, *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 104 S.Ct. 3065 and *United States v. Albertini,* ____U.S.____ , 105 S.Ct. 2897.

In *Community for Creative Non-Violence,* the constitutional basis for the demonstrators' claim concerned the effect of a park regulation upon the right to make a political statement. Had the

expressive conduct, i.e. sleeping, taken place, the demonstrators would have faced prosecution under the challenged park regulation. Similarly in *Albertini,* where the defendant's First Amendment claim stemmed from his re-entry onto a military base, it was the statute brought to bear against the defendant for his speech-related conduct which was reviewed by this Court.

In contrast under the New York Public Health Law, speech, protected or unprotected, simply cannot result in the commencement of a proceeding for closure. Upon this reasoning the Public Health Law cannot be said to be in any respect violative of the First Amendment command that no law shall be made "abridging the freedom of speech." Under the circumstances it is suggested that respondents are not entitled to employ a legal analysis which requires that the state's legitimate interest in enforcing its public health regulations be balanced against the individual's right to free speech. The clearly recognized important governmental interest which the present legislation serves (A18) is sufficient in and of itself to sustain its validity.

If this Court were to decide that the incidental impact involved in this case does warrant scrutiny under the First Amendment, respondents have nonetheless misapplied the relevant standard emanating from the recent decisions of this Court. The case at bar does not involve expressive conduct and, therefore, does not present a situation on all fours with *O'Brien, supra.* However, the legislation at issue can properly be evaluated as to whether it creates a reasonable time, place or manner restriction on speech under more recent decisions of this Court which have explicated the factors bearing upon the legitimacy of such restrictions.

A content neutral statute imposing an incidental restriction on speech is considered justified if it can be shown to further a substantial or important governmental interest and if it is narrowly tailored to serve that interest. In addition it must leave open ample alternative channels for communication (*Community for*

Creative Non-Violence, supra, 468 U.S. ___ , 104 S.Ct. at 3069). Once these preconditions are met, the question to be asked is whether the time, place and/or manner restrictions resulting from the application of the statute are reasonable (*Id., supra* at 3071). This Court, in determining the acceptable reach of a time, place or manner restriction, has concluded that the restriction will be valid if it promotes "a substantial government interest that would be achieved less effectively absent the regulation" (*Albertini, supra* at 2907). The Court has rejected the argument that regulations should be found invalid "simply because there is some imaginable alternative that might be less burdensome on speech (*Id.*).

As noted in I above, the Court of Appeals did not question the content neutrality of the statute, nor is there any legitimate basis upon which to ground a claim that the statute is not content neutral. Furthur the court explicitly affirmed the importance of the government interest sought to be served by the statute:

> "A statute aimed at the abatement of a public nuisance is certainly within the police power of the state (see, *Lane v. City of Mount Vernon,* 38 N.Y.2d 344; *Lawton v. Steele,* 119 N.Y. 226, aff'd, 152 U.S. 133). We also have no difficulty concluding that restriction of the conduct alleged in the complaint furthers an important governmental interest. Prostitution is criminal activity no matter where it occurs (Penal Law Section 230.00), and the other sexual activity alleged is prohibited in public places (See, Penal Law Section 245.00; cf., *People v. Adult World Bookstore, supra,* 108 Cal.App.3d at 410 ["Not everyone who enters a dirty bookstore expects to be molested, propositioned, or subjected to an open view of live homosexual acts of others."])." (A18).

With regard to whether the statute is narrowly tailored to meet these legitimate and substantial objectives it need only be observed that the state's interest in controlling prostitution and the spread of venereal disease is directly served by closure of the spe-

cific sites at which lewdness, assignation or prostitution occur.[4] The desire to rehabilitate the premises for alternative use is clearly facilitated by proscribing all activity for a period of time in order to insure that former use patterns at the site are broken. Contrary to the situation presented by *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 104 S.Ct. 2839 and *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 618, 100 S.Ct. 826, the legislation under consideration presents a "core of easily identifiable and constitutionally proscribable conduct" with precise means delineated to accomplish the State's objectives (*Munson, supra* at 2852, 2853). As concerns application, it can be noted that both the intermediate appellate court and the Court of Appeals have observed that the Public Health Law requires a showing of "a consistent pattern of conduct sufficient to prove that the premises are being employed for a proscribed use" (A11) as prerequisite to the imposition of closure thereby further narrowing the legitimate targets to which the statute can be directed.

On the question of alternative channels for communication, reference is made to II above. Where respondents are not prevented from moving to another available site and where both the Village of Kenmore and the surrounding Town of Tonawanda have set aside ample areas to accommodate commercial establishments such as the respondents' business, no constitutional deprivation can be said to occur. While closure would create an undeniable inconvenience for respondents who would be forced to move their commercial operation, such inconvenience would be no greater than that caused by eviction or even expiration of their lease.

[4] The Public Health Law Title under consideration in this case was considered by the Legislature to be appropriately included within the Article entitled "Control of Sexually Transmissible Diseases."

Having satisfied the preconditions of content neutrality, substantial governmental interest, narrow tailoring of the law to legitimate government objectives, and ample alternative channels of communication, the primary issue to be addressed by this Court is whether the place restriction imposed as a result of the statute is reasonable under the circumstances of this case. In addressing this question, this Court can first note the obvious fact that closure is unquestionably a more effective means of abating the nuisance at issue and of rehabilitating the situs than is injunction.[5] Closure provides no opportunity for the recurrence of the sexual activity on the premises while the remedy of injunction accepts the possibility of recurrence and punishes after the fact. Further, if injunction is ordered, officials will presumably be forced to monitor activities at the bookstore, and in the event of non-compliance, the state will be obliged to initiate further legal proceedings. It is worthy of note that one of the respondents in this case is not an individual but rather is a corporation, apparently immune from the imprisonment aspect of the contempt penalty relied upon as an effective deterrent by the Court of Appeals (A19). Under these circumstances, the closure remedy is in compliance with the requirement that the burden on speech be no greater than essential since, as established in *Albertini, supra,* such requirement is satisfied as long as the governmental interest is achieved more effectively with than without the neutral regulation (*Id.*, at 2907).

Not only is closure clearly more effective than injunction, but the court below has given no indication that it has done any more than indicate its disagreement "with the responsible decision

[5] It is further observed the the Penal Law, with its provision for arrest and incarceration, is considered by some legal scholars to be similarly ineffective in providing permanent relief for an area beset by prostitution. See Parnas, *Legislative Reform of Prostitution Laws*, 21 Santa Clara L.Rev. 669 at 688 (1981); O'Connor, *The Nuisance Abatement Law as a Solution to New York City's Problem of Illegal Sex Related Businesses*, 46 Ford. L.Rev. 57 (1977).

maker concerning the most appropriate method for promoting significant government interests" (*Id., supra* at 2907). Importantly, that court, in reviewing the legislative history of the statute under consideration, provided evidence that the Legislature has found injunction alone to be unsatisfactory:

> "The first version of what is now Title II was enacted in 1914 as Article 17-a of the Public Health Law, and was entitled "Suppression of Certain Nuisances" (L. 1914, Ch. 365, 51). The 1914 statute provided for only injunctive relief, and was aimed at any building in which 'assignation or prostitution' was conducted. In 1927, the Legislature, *apparently not content with the effectiveness of the 1914 statute*, repealed that version and enacted a statute (Title 17-a) which covered any building used for 'lewdness, assignation or prostitution' and provided for an order of abatement (see L. 1927, ch. 670). The present version of Title II is essentially a reenactment of the 1927 statute. : . ." (emphasis added) (A8).

Immediately apparent from the Court of Appeals' decision is the foreseeable discriminatory application to which the law would be subject. Creating an exception for proprietors of adult bookstores while permitting closure to be employed against proprietors of other commercial establishments whose First Amendment rights would also be affected by closure "might create a risk of engaging in constitutionally forbidden content discrimination" (*See Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 2135). The content neutral Public Health Law statute would in its application lose the neutral, evenhanded quality which the legislature intended it to have.

On the other hand the Court of Appeals' decision, although seemingly tailored to the facts of this case, might well be construed to have application in all cases wherein closure would incidentally limit the exercise of First Amendment rights. That the exception sought to be carved out by the court for bookstores would quickly engulf the rule becomes evident when it is recog-

nized that closure could have a similar impact on the First Amendment rights of almost any commercial establishment. Said businesses would be unable to advertise, solicit, or promote their products from the site subjected to closure and, therefore, under the reasoning provided by the Court of Appeals, would be entitled to an *O'Brien* analysis with the burden on the government to prove that a solution less intrusive than closure would not be effective to abate the nuisance. Such a circumstance would at a minimum vitiate the usefulness of the closure remedy for purposes of nuisance control.

On balance, closure operates at most as a reasonable restriction on the place from which respondents may disseminate information. The minimal burden, if any, placed upon the First Amendment by closure is amply justified by the substantial public interest involved.

IV

There exists no state constitutional basis for the ruling of the New York Court of Appeals.

Respondents' assertion that the New York Court of Appeals' decision is grounded in the state constitution finds no basis in the opinion issued. In its legal analysis of the question at bar, the court below relied heavily upon several of this Court's precedents pertinent to the protection to be accorded the exercise of free speech and expression under the Constitution of the United States. As the foremost and controlling authority for its determination that the Public Health Law closure provision constituted an "unconstitutional restraint on defendant's First Amendment rights," the Court of Appeals cited to this Court's opinion in *United States v. O'Brien, supra,* and concluded that the statute in question did not satisfy the fourth prong of the *O'Brien* test.

The Court of Appeals made no citation to the New York Constitution as authority for its "prior restraint" determination. Its singular reference to the state constitution in the opinion occurs

only in the court's restatement of respondents' arguments upon the original motion for partial summary judgment in the court of first instance (A-6). The absence of citation to the state constitution stands in sharp contrast to the Court of Appeals' nineteen references throughout its opinion to the "First Amendment." Indeed the court, in considering the position presented by the dissent at the intermediate appellate level, specifically acknowledged that its decision was grounded upon the First Amendment.[6]

While the Court of Appeals' opinion did refer to the "test" described in the court's earlier decision in *Nicholson v. State Commission on Judicial Conduct*, 50 N.Y.2d 597, such reference was only to note that the "test set forth [therein] most closely resembles the Supreme Court's decisio in *United States v. O'Brien*, (391 U.S. 367)" (A17). Citing to *eople ex rel. Van De Kamp v. American Art Enterprises, Inc.*, 33 Cal. 3d 328, and *Commonwealth v. Croatan Books, Inc.*, 323 S.E. 2d 86, and noting that in those cases it was similarly determined that *O'Brien* established the appropriate standard for review, the New York Court stated, "We agree with these decisions, and thus turn to an applicatio: of the four-part *O'Brien* test" (A18).

Furthermore, as a reading of *Nicholson* makes clear, the court in that case was concerned with the application of the First Amendment of the federal constitution to a state commission's

[6] As stated in footnote 3 of the court's opinion:

> "Thus we agree with the majority at the Appellate Division that a defendant in a civil action may move for summary judgment on a cause of action on the ground that the relief sought would be unconstitutional, at least where, as here, there are First Amendment interests asserted. Our adjudication of the First Amendment issue seems particularly appropriate under the circumstances of this case, as the unconstitutional restraint would have already occurred and the issue would likely be moot by the time of any posttrial review by us" (A7).

There is no 'First Amendment' to the New York Constitution. In New York, the freedom of speech is protected under New York Constitution Article I, §8.

authority to investigate. The test formulated was derived solely from federal precedents. *Nicholson* neither controlled the Court of Appeals' determination of the closure issue herein, nor provided any state basis for the holding below.

This Court, indicating its respect for state courts as well as its intent not to issue advisory opinions, plainly stated the applicable standard for review of state court decisions by the Supreme Court:

> "Accordingly, when as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1042, 103 S. Ct. 3469, 3476.

In the present case it is patent that the New York Court of Appeals decided that the closure contemplated by the present action was inimical to the First Amendment to the Constitution of the United States. The opinion provides neither a clear nor unclear statement that the decision rests upon any articulable state ground. Thus, this Court need not decline to review the constitutional question presented by the present case.

V

The court's decision does not present a construction beyond the review of this Court.

The respondents assert that the court below "interpreted the statute as providing a two-tiered level of control" (Respondents' Brief, 19) with the first tier allowing for the enjoinment of the nuisance described herein and the second tier providing for closure of the subject premises upon proof that the injunction did not abate the perceived evil.[7] It is contended that this "two-tiered" approach is a matter of statutory construction to which deference "must be accorded" so as to "give effect to the state's own constitution" (Respondents' Brief, 20).

Firstly, since the case was decided below as a matter of federal constitutional law (see IV above), it is difficult to envision how a ratification of the ruling by this Court would serve to "give effect" to the New York State Constitution. Secondly, the interpretation or construction here asserted by the respondents is necessarily reliant upon a liberal measure of subjective analysis since the decision rendered does not delineate the "two-tiered" level of control respondents describe.

Review of the opinion of the Court of Appeals demonstrates that upon eliminating closure as a potential remedy which might be utilized against respondents' bookstore, the court did recognize injunction as an alternative remedy to be employed in the attempt to eradicate the Public Health Law nuisance allegedly existing upon the bookstore premises. It is clear, however, that the procedure articulated by the court was not the same as that conjured up by the respondents in their present argument before this Court.

---

[7] Respondents are really asserting an interpretation of Article 23 rather than the "statute" for Section 2329, the closure provision, does not concern itself with the remedy of perpetual injunction which is provided for under Section 2321.

In defining the limits of the Public Health Law nuisance abatement procedure resultant from its First Amendment analysis, the majority of the Court of Appeals stated:

> "If the District Attorney succeeds at trial, he will be entitled to a permanent injunction against the existence or maintenance of a nuisance in violation of Section 2320 and the injunction will be binding upon defendant. *A violation of any of the provisions of the injunction would be contempt,* punishment for which could include imprisonment (see Sections 2327, 2328)" (emphasis added) (A19).

There is no statement in the opinion indicating that a violation of the injunction could foster a renewed action for closure in the place of a contempt proceeding or that closure could be contemplated after a successful contempt proceeding had been completed. While the Court of Appeals did cite *Croatan Books, supra,* a case where injunction and closure were employed by the trial court in a bifurcated process, it was only to agree that the *O'Brien* test was applicable under circumstances where a bookstore is targeted for closure. The court made no pronouncement that it was adopting the procedures utilized in *Croatan* as the law of New York to be applied to this or any other bookstore.

Moreover, the decision in *Croatan* does not support the adoption of the mandatory two-tiered approach outlined by the respondents. In *Croatan* there was no suggestion that permanent injunction must be employed in the first instance with closure acceptable only upon violation of the injunction. In fact, the Virginia Supreme Court specifically recognized that its Legislature had cast the abatement statute in mandatory language requiring closure. The court observed that the California Supreme Court had chosen in *People ex rel. Van de Kamp, supra,* to construe its statute to be merely permissive, but noted that, "We have given no such construction to the Virginia statute, nor do we do so now" (*Id., supra* at 90). However, since the trial court had ordered injunction without objection from the parties, the Virginia Supreme Court took the opportunity to comment that injunctive

relief failed to prove effective and that such failure "vindicate[d] the legislative determination that closure is necessary to abate the kind of outrageous criminal activity disclosed by the record" (*Croatan, supra* at 90). Thus even in *Croatan* there was no appellate ratification of a procedure requiring that injunction be imposed prior to closure.

Even assuming that the court below did determine that closure is not available as a remedy in the first instance but is available upon a subsequent showing of the continuing existence of the nuisance, it is clear that such determination was based upon the Court of Appeals' conclusion that the First Amendment to the United States Constitution required this procedure where a bookstore occupied the premises contemplated for closure. As stated by this Court in *New York v. Ferber*:

> "While the construction that a state court gives a statute is not a matter subject to our review, [citations omitted], this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law. It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state court decisions giving the Constitution too little shrift") 458 U.S. 767, 102 S.Ct. 3348, 3360).

Similarly, this Court has affirmed its jurisdiction to review those state court decisions where the court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner that it did" *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2854; *see also Delaware v. Prouse*, 440 U.S. 648, 652, 99 S.Ct. 1391, 1395-1396 and *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 3474 n. 4.

Whether the New York Court of Appeals has invalidated for all time the application of the closure provision to respondents' bookstore or has determined that the remedy of injunction must be utilized prior to commencement of an action for closure, there

exists the inescapable conclusion that the court's action was the result of what it considered to be the strictures of the federal constitution. Accordingly this Court may undertake review of the issue presented by the case at bar.

Respondents additionally contend that "the two-step process derived from the Public Health Law legislation serves to conclusively distinguish this case from *Clark v. Community for Creative Non-Violence*, ____U.S.____ , 104 S.Ct. 3065 and *United States v. Albertini*, ____U.S.____ , 105 S.Ct. 2897 ...." (Respondents' Brief, 22). The argument suggests that since the court below did not speculate or hypothesize as to a "lesser" restriction (respondents point out that injunction was already available under the Public Health Law), the rationale of *Community for Creative Non-Violence* and *Albertini* is inapplicable.

Respondents' argument misses the point of both *Community for Creative Non-Violence* and *Albertini*. The import of those decisions related not to whether a less restrictive means was *hypothetical* as opposed to being identifiable from companion statutes. Rather the cases put forth the principle that in reviewing a statute serving an important governmental purpose unrelated to the suppression of free expression the courts should not replace the responsible decision makers as to the correct method to effectively promote the government's interest.

It is difficult to understand how respondents take solace in their concession that there is no expressive element in the conduct sought to be regulated herein. It would seem that if the regulations reviewed in *Community for Creative Non-Violence* and *Albertini* which operated to limit assertedly expressive conduct were found to be valid under the federal constitution, the present legislation aimed at the regulation of conduct with no expressive element should fare at least as well.

The reality of the present case is not that suggested by respondents, namely "that an unpopular point of view is being sup-

pressed" (Respondents' Brief, 27). Rather, "he state legislature has sought to serve its interest in the control of indiscriminate sexual activity upon premises open to the general public in an across-the-board evenhanded manner. That body has accorded no establishment or institution more favorable treatment because of the particular nature of any business classification. The Court of Appeals' dangerous precedent authorizing the unequal treatment of different establishments under the law far outshadows the minimal, indirect, and incidental effect that closure would have upon the respondents' right to disseminate sexually explicit materials.

Respectfully submitted,

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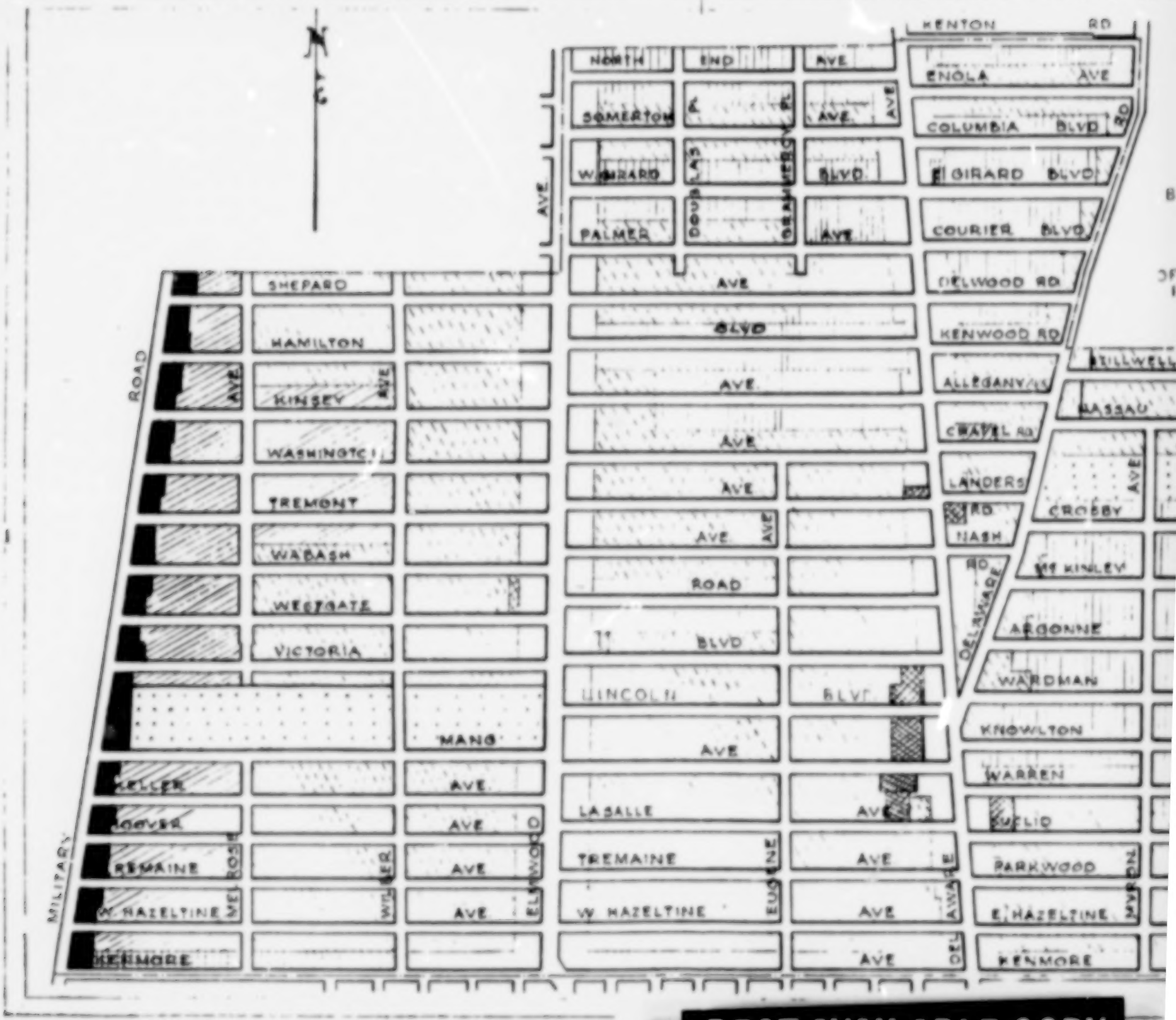
Assistant District Attorneys
Of Counsel

APPENDIX

Village of Kenmore Zoning Map



Ex. A

VILLAGE OF KENMORE
New York

OFFICIAL ZONING MAP
ADOPTED MARCH [illegible]
REVISED DECEMBER 15, 1[illegible]

Ex. B

TONAWANDA TOWN CODE

ARTICLE XV
Adult Uses

§ 215-96. Purpose.

Buildings and establishments operated as adult uses are detrimental and harmful to the health, safety, morals and general welfare of a community in that they engender adverse effects which contribute to the blighting or downgrading of a surrounding neighborhood. In order to promote the health, safety, morals and general welfare of the residents of the Town of Tonawanda, this Article is intended to restrict adult uses to nonresidential areas of the town, excluding the Village of Kenmore, and otherwise regulate their operation. Moreover, because the operational characteristics of adult uses which are concentrated in a particular area are such that the deleterious impact on the surrounding neighborhood is increased, this Article is intended to promote the health, safety, morals, general welfare and good order of the residents of the Town of Tonawanda by regulating the concentration of such uses.

§ 215-97. Definitions.

As used in this Article, the following terms shall have the meanings indicated:

ADULT BOOKSTORE — An establishment having as a substantial or significant portion of its stock-in-trade books, magazines, films for sale or viewing on the premises, by use of motion-picture devices or any other coin-operated means, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas; or an establishment with a segment or section devoted to the sale or display of such material.

ADULT ENTERTAINMENT CABARET — A public or private establishment which is licensed to serve food and/or alcoholic beverages, which features topless dancers, strippers, male or female impersonators or similar entertainers.

ADULT MINI-MOTION-PICTURE THEATER — An enclosed building with a capacity of less than fifty (50) persons which is used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

ADULT MOTION-PICTURE THEATER — An enclosed building with a capacity of fifth (50) or more persons which is used regularly and routinely for presenting material having as a dominant theme material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

PERSON — Any person, firm, partnership, corporation, association or legal representative, acting individually or jointly.

SPECIFIED ANATOMICAL AREAS:

A. Less than completely and opaquely covered human genitals, pubic region or female breast below a point immediately above the top of the areola.

B. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

SPECIFIED SEXUAL ACTIVITIES:

A. Human genitals in a state of sexual stimulation or arousal.

B. Acts of human masturbation, sexual intercourse or sodomy.

C. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

§ 215-98. Locations.

Adult uses, including but not limited to adult bookstores, adult motion-picture theaters, adult mini-motion-picture theaters and adult entertainment cabarets, shall be permitted subject to the following restrictions:

A. No such adult uses shall be allowed within five hundred (500) feet of another existing adult use.

B. No such adult use shall be located within five hundred (500) feet of the boundaries of any premises zoned A First Residential, B Second Residential or M-F Multi-family Dwelling District, nor shall such use be located within five hundred (500) feet of the boundaries of a property used for residential purposes.

C. No such adult use shall be located within five hundred (500) feet of a preexisting school or place of worship.

D. No such adult use shall be located in any zoning district except those zoned P-S Performance Standards Use District or G-I General Industrial District.

§ 215-99 Registration with Clerk required.

A. The owner of a building or premises, his agent for the purpose of managing, controlling or collecting rents or any other person managing or controlling a building or premises, any part of which contains an adult use, shall register with the Town Clerk of the Town of Tonawanda the following information:

(1) The address of the premises.

(2) The name and address of the owner of the premises and the names and addresses of the beneficial owners if the property is in a land trust.

(3) The name of the business or the establishment subject to the provisions of this Article.

(4) The name(s) and address(es) of the owner, beneficial owner or the major stockholder(s) of the business or the establishment subject to the provisions of this Article.

(5) The date of initiation of the adult use.

(6) The nature of the adult use.

(7) If the premises or building is leased, a copy of said lease.

B. It is a violation of Article XV for the owner or person in control of any property to establish or operate thereon or to permit any person to establish or operate thereon an adult use without having properly registered said adult use with the Town Clerk.

§ 215-100 Display of registration.

The owner, manager or agent of a registered adult use shall display in a conspicuous place on the premises of the adult use a copy of the registration filed with the Town Clerk.

§ 215-101. Observation from unregistered property.

No adult use shall be conducted in any manner that permits the observation of any material depicting, describing or relating to specified sexual activities or specified anatomical areas from any public way or from any property not registered as an adult use. This provision shall apply to any display, decoration, sign, show window or other opening.

§ 215-102. Special performance standards use permits.

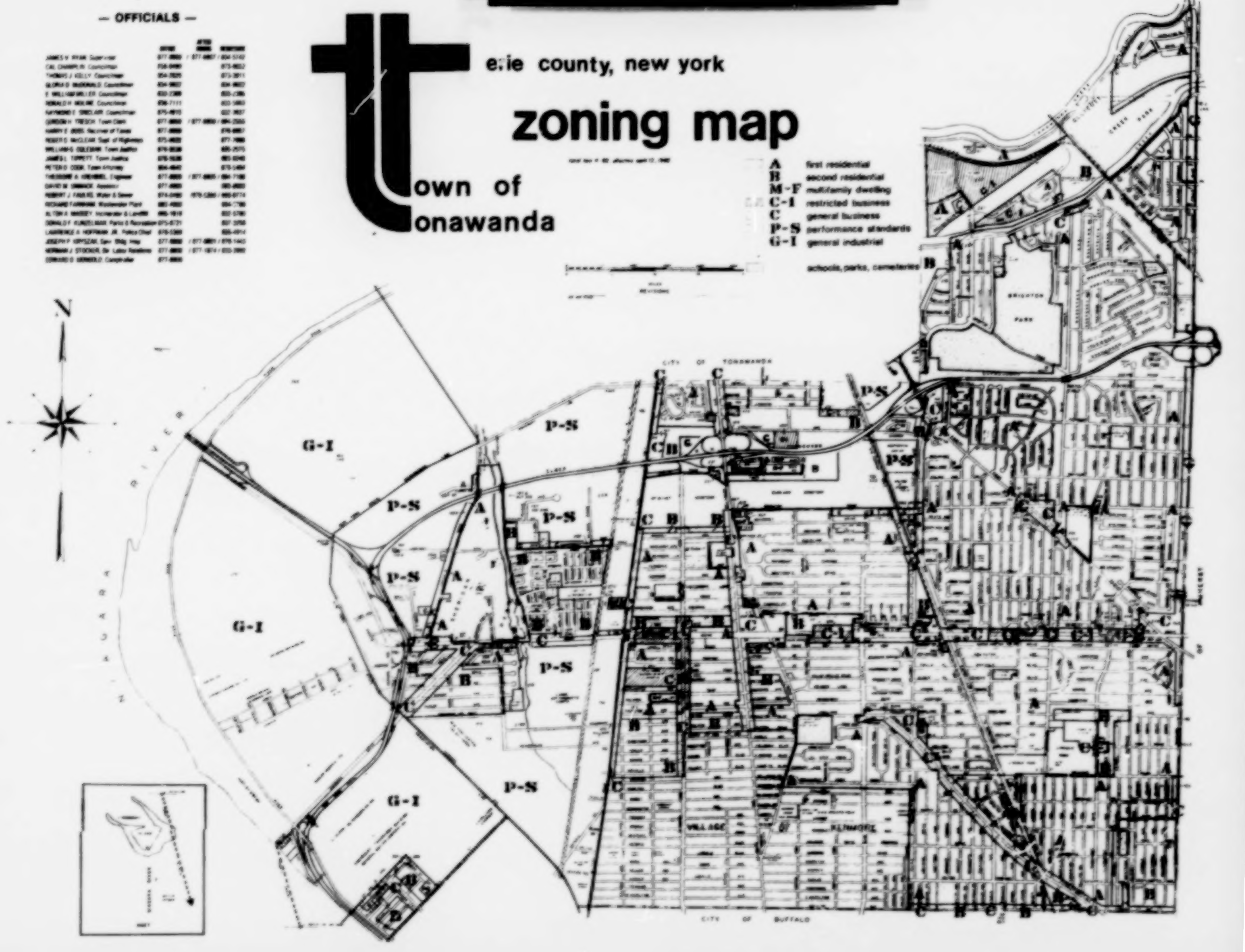
A. No use as described in this Article shall be established until the issuance of a special performance standards use permit by the Town Board. Application for such a special performance standards use permit shall be in writing to the Town Board and shall consist of a description of the premises for which the permit is sought, a plain and concise statement of the use which is proposed and such additional information as shall be required by the Town Board. The Town Board shall call a public hearing for the purpose of considering the request for such a special performance standards use permit. At least ten (10) days' notice of the time and place of public hearing shall be given by the publication of a notice in a newspaper of general circulation in the town, indicating the general nature of the public hearing and the fact that those persons interested therein may be heard at the time and place of such hearing.

B. A special performance standards use permit issued under the provisions of this section shall not be transferable.

BEST AVAILABLE COPY

Ex. C

Town of Tonawanda Zoning Map



AMICUS CURIAE

BRIEF

In The

Supreme Court of the United States

OCTOBER TERM, 1985

85-437

THE PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,

Petitioner,

vs.

CLOUD BOOKS, INC. d/b/a,
VILLAGE BOOK AND NEWS STORE,
CHARLES A. OTTAVIANO,
BLANCHE DUDLEY and
all other persons unknown claiming
any ownership, right, title or
interest in the property affected
by this action,

Respondents.

ON WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

AMICUS CURIAE BRIEF OF THE CITY OF SANTA ANA, CALIFORNIA, IN SUPPORT OF PETITIONER

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES, ORDINANCES, RULES

TEXTS, ETC.

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INTEREST OF AMICUS CURIAE CITY OF SANTA ANA

The "closure" issue, which the Erie County District Attorney's

"Petition for Writ of Certiorari" has framed, is presented to this Court in the context of a procedural "pleading" problem, and before the trial of the lawsuit has taken place. In his petition, two basic propositions of law are urged. The first holds that his verified complaint alleges sufficient facts to establish the existence of a continuing moral public nuisance which, under New York case law and Article 23, Title II of the Public Health Law, commonly identified as a Red Light Abatement Statute, would authorize an equity court to award equitable relief in the form of closure of the premises. Those factual allegations are:

(1) The defendant Cloud Books, Inc., as the operator of the premises, permitted and ratified conduct of third parties on the premises which consti-

tuted the crime of public lewdness as defined by state law (complaint at paragraphs 9, 10, and 17);

(2) The normal criminal penalties are ineffective and inadequate in preventing or punishing the activities which are described and do not afford the requisite protection to health and safety of the public (complaint at paragraphs 10 and 17);

(3) The common fame and general reputation of such premises and building is that it is a place kept, conducted, and maintained for the purpose of lewdness (complaint at paragraph 19);

(4) The common fame and general reputation of the occupants thereof and frequenters thereto is that of individuals engaged in criminal conduct (complaint at paragraph 19); and

(5) That unless closed to such

use, the defendants will continue "to use, occupy, and maintain said building and premises, together with the furniture, etc. . . for the purposes herein complained of, and that they and each of them will continue to allow, permit, and encourage the maintenance and continuance of said nuisance on said premises, to the irreparable damage to the people."

The Erie County District Attorney's second proposition of law holds that the defendant Book Store operator's mere denomination of the premises as a book store does not evoke the First Amendment provisions of the Federal Constitution and immunize the premises from the equitable remedy of closure of the premises as a moral public nuisance.

During the 1981, 1982, and 1985 October Terms of Court, Amicus Curiae

has attempted, without success, to place this same "closure" issue and the same two basic propositions of law before this Court for resolution. The Santa Ana City Attorney's petitions, involving the operation of a theater in Santa Ana, are substantially the equivalent of the petitions of the Erie County New York District Attorney, regarding the operations of the book store in Erie County herein. See "Petition for Writ of Certiorari" in People ex rel. Cooper, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term 1981, No. 81-271; "Petition for Writ of Certiorari" in Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term 1982, No. 82-345; "Petitioner's Reply and Supplemental Brief" in No. 81-271; "Petitioner's Motion for Leave to File

Out-of-Time Petition for Rehearing, With Petition for Rehearing Annexed," October Term 1981, No. 81-271; "Petition for Writ of Certiorari" in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term 1985, No. 85-439; and "Petition for Rehearing" October Term 1985, No. 85-439, presently pending before this Court.

One important factual difference in the above-described petitions of the City of Santa Ana is that, whereas the Erie County issue was framed in the context of a procedural "pleading" problem, the Santa Ana "Petition for Writ of Certiorari" in No. 81-271 presented a case where the civil public nuisance abatement lawsuit had been tried and was being reviewed upon

appeal, and the trial judge had made findings of fact and conclusions of law that, were it not for the existence of such "immunity," he would have closed the premises. See "Petition for Writ of Certiorari" in No. 81-271 at page 25, Footnote 4, reading as follows:

> 4/ See Conclusion of Law XVI, Infra, at pages C-29 and C-30 which reads:
>
> "Under the facts in this case, namely, that the Defendants are engaged in the commercial exploitation of obscene motion picture films and have for a substantial period of time in the past and as a continuing and regular course of conduct exhibited sexually explicit films depicting oral copulation, sodomy, masturbation, homosexuality, lesbianism, group sex, portrayed incest, portrayed rape, the licking of sperm from the bodies of the actors and smearing of sperm on the face, and have admitted their intention to continue to show the same similarly sexually explicit films in the future, the abatement remedy of closing the defendants' theater for a period of time would otherwise constitute a proper and suitable equitable remedy except for the law expressed in People ex rel. Busch v. Projection Room Theater (1976), 17 Cal.3d 42, 58 that

such closure is prohibited by the Constitution of the United States as a prior restraint."

See, also,"Motion for Leave to File Out-of-Time Petition for Rehearing With Petition for Rehearing Annexed" in No. 81-271 at page A-15, setting forth the remarks of Trial Judge Weeks at the settlement conference on the Findings of Fact and Conclusions of Law on May 2, 1978:

"THE COURT: . . . As I see it, that if the Appellate Court disagrees with my Conclusion of Law as stated in Busch and the Constitution, then they may see fit to reverse my decision, you see, based on this enumerated set of circumstances, and that is the way I see it, and I think that the atmosphere of the community and the cases are such that the Court, the Appellate Court, whichever one it is, here or in San Francisco or in Washington, D.C. should have the opportunity to know that this little guy, that is sitting down here by assignment from the Municipal Court recognized that he would have closed this theater, based on the law, if it were not for the Busch case and the Constitution and that's all that I wish to portray in this Conclusion. And so, while

I accept your position that, because it is stated that way, that it is critical of the law, it is not intended to be. It is simply intended to be my opinion of a correct status of what the law is, and what the facts were in this particular case."

Another factual difference in the Santa Ana Statement of Facts is that, whereas in the Erie County pleadings, the lewd public conduct was three (3) dimensional, and the allegation that such conduct was performed by third parties, with the knowledge of and ratified by the book store operator, was controverted by the verified answer of the book store operator, see verified answer of Cloud Books, Inc. at page A-64 et seq. of the"Petition for Writ of Certiorari" in 85-439, the Santa Ana petitions presented a factual situation where the 'ewd conduct was produced, directed, and photographed by the defendant, Mitchell Brothers', and placed on motion picture film for two (2)

dimensional projection on the screen of the Mitchell Brothers' Santa Ana Theater. See "Petition for Writ of Certiorari" in No. 81-271 at pages 5 and 6 reading as follows:

> "Thereafter, the City of Santa Ana issued a business license, and on September 3, 1975, the Mitchell Brothers' Santa Ana Theater commenced its operations under the new management. The first program offered a triple feature: "Sodom and Gomorrah," "Behind the Green Door," and "Resurrection of Eve" (R.T. 946 line 9-15; 1049 line 22-1050 line 5), all three of which were produced, directed, and photographed by James Mitchell and Artie Mitchell, and distributed and exhibited by them in their finished form at their own chain of theaters, acquired by them during the period 1973-1975, and operated as a theater chain under the name, "M.B.F.G. Theater Circuit." (Plaintiff's Exhibit No. 90, R.T. 1045 line 6-11). At the time they commenced their Santa Ana operations, they openly advertised their theaters in Northern California as "Mitchell Brothers' Porno Theaters" (R.T. 1051 line 26) and the films which they had produced, directed, and photographed as "hard-core" (R.T. 1055 line 6).
>
> The history of the growth of the operations of James Mitchell and Artie Mitchell, from 1969, as producers and exhibitors of sexually oriented films at their O'Farrell Theater at 895 O'Farrell Street in San Francisco, to their operations in 1975, when they billed themselves as "the Cecil B. DeMille and David O. Selznick of modern porn" (R.T. 1045), is described in the trial testimony of James Mitchell, (C/A.O.B. at A-54 through A-84 and A-116 through A-137). An operational chart of the defendants' "pandering" businesses (Plaintiff's No. 77) appearing on the opposite page, was prepared from the testimony of James Mitchell."

See, also, the photographs of the two (2) dimensional lewd conduct which the Mitchell Brothers' continuously projected onto the public screen of the Santa Ana Theater, appearing in the time and motion studies of the three films, at Appendix D-1 through D-185 in the "Petition for Writ of Certiorari" in No. 82-345.

A significant factual difference in the Santa Ana City Attorney's "Petition for Writ of Certiorari" in No. 85-439, which is presently pending before this Court on a "Petition for Rehearing" is that, whereas in the Erie

County pleadings, it was merely alleged that the "normal criminal penalties are ineffective and inadequate in preventing or punishing the activities described above and do not afford the requisite protection to health and safety of the public," and the New York Court of Appeals' decision on that issue can be narrowly interpreted as a holding that "on these facts," see "Petition for Writ of Certiorari" in No. 85-437 at page A-3, and at this stage of the pleadings, an injunction was not inadequate, see "Petition for Writ of Certiorari" in No. 85-437 at pages A-18 and A-19 holding:

> "In Croatan Books, the court specifically noted that, following an initial hearing, the trial court had ordered temporary injunctive relief designed to eliminate the nuisance without closing the premises, and that the evidence at a second hearing showed that this relief had been ineffective. The court was thus able to conclude that 'less restrictive

> remedial measures failed to abate what the trial court had unequivocally found. . .to be a nuisance' (323 SE2d at 90). In the present case, there has been no 'less restrictive' relief imposed, nor has the District Attorney demonstrated that the injunctive relief provided for in Title II would be insufficient to abate the nuisance;"

the Santa Ana "Petition for Writ of Certiorari" in No. 85-439 pleads a factual record of ten continuous years of the same conduct which contains abundant proof that the remedy of injunction is not adequate and that the equitable remedy of "closure" is essential if the continuing public nuisance is to be abated. See the "Petition for Writ of Certiorari" in No. 82-345 at Point II on pages 54-55 reading:

> "As applied to the trial facts herein, the single right to a personal injunction against a specific obscene film which the Court of Appeal authorizes, is an illusion and fails to provide an adequate remedy. See footnote 12 infra at p. 55. The

Mitchell Brothers' business practice is to show 2 pornographic films on a program and change the program each week. In 7 years, the theater has exhibited approximately 500 different pornographic titles. The short run of each film and the theater's ability to shorten that run even further, coupled with the practical problem of Plaintiff's not being able to force the defendants to an early trial on the merits in such cases, makes the personal injunction against a specific film worthless, especially where the film itself must be given back at the conclusion of the lawsuit, and it can be expected that each of such lawsuits will be tenaciously resisted, that the City's costs of abatement will be substantial, and that the costs may not be recovered by the Plaintiff in such lawsuit either as costs of abatement or damages or attorney's fees. On the other hand, the defendants benefit from such prolonged and unproductive litigation, in that the substantial profits being derived from the box office of the moral public nuisance, ($1200.00 per day, see Statement of Facts at page 20, fn. 4; Appendix C-18) provide the defendants with a slush fund which more than underwrites their costs of litigation and allows a substantial profit, whereas the budgetary problems of Cities today make such prolonged and unproductive litigation unattractive. (The cost to the City of Santa Ana for the first public nuisance abatement lawsuit was $71,420.20.)"

See, also, the "Certificate of Counsel" in support of "Petition for Rehearing" in No. 85-439 at pages 13-16, filed in this Court after its grant of a Writ of Certiorari on the issue of "closure" in the Erie County case herein, reading as follows, with underlining to emphasize the proposition being urged herein that the remedy of "injunction" is <u>not</u> adequate and that "closure" is essential:

"CERTIFICATE OF COUNSEL

I, JAMES J. CLANCY, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 51 of the rules of this Court.

The City of Santa Ana has maintained a <u>continuous weekly photographic and sound surveillance</u> of the Mitchell Brothers' Santa Ana Theater <u>for the ten (10) year period from November 27, 1975 through and including November 27, 1985</u> and on May 7, 1985, filed a fifth civil action entitled, <u>People of the State of</u>

California ex rel. Cooper, City Attorney for the City of Santa Ana; City of Santa Ana, a Municipal Corporation v. Mitchell Brothers' Santa Ana Theater, et al., being a Verified Complaint in Equity for Abatement of Public Nuisances, Declaratory Judgment, Injunctions in which it has alleged at paragraphs 27 through 30 the following facts to presently exist:

" 27. The continuing course of conduct of exhibiting obscene matter, which the Mitchell Brothers' Santa Ana Theater and its operators are engaged in, has caused and continues to cause irreparable harm to the Plaintiff CITY OF SANTA ANA and its residents, in that its continuing existence across the street from the Santa Ana Junior College as a business which is licensed by the City of Santa Ana, is a source of scandal causing: (1) reputational damage to the City and its community standards, and (2) a potential for harm to its residents by misrepresenting to the world and particularly to children of tender and impressionable years living within the community that the community as a whole has accepted such conduct as lawful.

"28. The exhibition of said 'motion pictures' and previews at said theater is indecent and offensive to the senses so as to interfere with the confortable enjoyment of life and property and, therefore, constitutes a public nuisance per se.

"29. For the purpose of documenting evidence to prove the doing of wrongful acts, i.e., the exhibition of obscene "motion pictures" and motion picture films at the defendant Mitchell Brothers' Santa Ana Theater and the maintenance of public nuisances, plaintiffs directed that certain individuals, acting as their agents, enter the Santa Ana Theater each week during the period from Nov. 27, 1975, through the date of filing this complaint, and therein view and photograph the visual images, conduct, and scenes being projected and depicted on the motion picture screen, and tape record the sound track being played in the theater. Said individuals, acting as plaintiffs' agents, paid the required admission fee each time they entered the Mitchell Brothers' Santa Ana Theater.

"30. The photographs and tape recordings made in the Mitchell Brothers' Santa Ana Theater have been used to construct time-and-motion studies and to provide foundation evidence for the use of secondary evidence in the form of video-tape cassette copies of the motion picture films and previews named in paragraph 20, above. Such time-and-motion studies consist of a chronological series of photographs timed in their relative order of appearance with legends setting forth the story line of the film. Said time-and-motion studies by "freeze-framing" the movement appearing on the screen and recording the same permit the type of lewd and obscene subject

matter being portrayed in such motion picture films to be analyzed in a fair and accurate manner. Said studies also fairly and accurately depict the conduct, including explicit sexual conduct described in paragraph 23, which is and was being portrayed on the motion picture screen on the dates such photographs were taken. Said images on the screen and the accompanying sounds being produced in the theater constitute a public nuisance "in esse" on such dates which is separate and apart from the public nuisance in the form of the positive motion picture film print instrumentality which was being used for the projection of such visual images and sounds.

Executed this 29th day of November, 1985, at Sun Valley, California.

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Amicus Curiae City of Santa Ana filed its first "Petition for Writ of Certiorari" in No. 81-271 on August 10, 1981. This Court granted the same in Edward Cooper, City of Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al. No. 81-271, at 454 U.S. 90, as to question 2 (burden

of proof), but denied the petition on the "closure" issue (question 1) on November 30, 1981---over four years ago. Upon remand to the Court of Appeal, the City of Santa Ana argued in its plaintiff/appellant's Supplementary Brief, filed on January 4, 1982, that this Court's denial of the petition on the closure" issue was under its discretionary power pursuant to Rule 17.1 of the Rules of The United States Supreme Court and was not "on the merits" and that this Court's note of jurisdiction on the closure issue in U.S. Marketing, Inc., et al. v. State of Idaho, No. 81-741, on January 11, 1982, six weeks after its denial of the Petition for Writ of Certiorari on the same issue in the Santa Ana petition had reestablished "closure" as a litigable issue and that the court should reexam-

ine the entire appeal, in greater depth, including the "remedy" issue as to closure, see Point I, reproduced in "Motion for Leave To File Out-Of-Time Petition For Rehearing, With Petition For Rehearing Annexed" in No. 81-271 at pages A-5 et seq. In its opinion, the Court of Appeal rejected the City of Santa Ana's argument as to the scope of the appeal and reiterated its earlier opinion on remedies in its entirety and remanded the case to the trial court to allow the City Attorney to seek the one equitable remedy that the Court of Appeal held was available under the Federal Constitution and its interpretation of this Court's opinion in Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980), namely, an injunction as to the remaining six films.

Santa Ana's experience with hard-

core pornography at the Mitchell Brothers' Santa Ana Theater as a "continuing public nuisance" for the past ten years, is a governmental problem which is facing all cities. The problem has escalated. The same pornographic movies and continuing public nuisances are now appearing on television.

Confusion as to what remedies an equity court can apply after trial of a nuisance lawsuit is the result of this Court's not having squarely addressed the problem since Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Art Theater Guild, Inc. v. Ohio ex rel. Ewing, 421 U.S. 923 (1975) and having avoided the issue in No. 81-271. Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980) is inapposite on the issue of what remedies may be applied after a trial on the merits, but continues to be mis-cited.

This Court's refusal to exercise its discretionary jurisdiction in No. 81-271 on November 30, 1981, has created an imbalance in the law on public nuisance in California which has made it impossible to abate the continuing public nuisance now in its tenth year of existence at the Mitchell Brothers' Santa Ana Theater. Additionally, in the interim, the "law of the case" principle on finality has resulted in a substantial number of injustices in the California courts in Case No. 25-65-30. Unless this Court corrects that imbalance through its opinion in this Erie County case, that imbalance can be expected to cause additional injustices to Amicus Curiae City of Santa Ana in the near future. In the view of this Amicus Curiae, the alleged injustices include the following matters:

(1) The California Trial and Appellate Courts have refused to give legal consideration to (hear argument) and rule upon the merits of Santa Ana Ordinance NS-1287, enacted on January 19, 1976, which declares that "any and every place in the City of Santa Ana where: 1) obscene films are publicly exhibited as a regular course of business, or possessed for the purpose of such exhibition, is a public nuisance" (our emphasis). Santa Ana Ordinance NS-1287 was enacted to overcome the interpretation in People ex rel. Busch, et al. v. Projection Room Theater, 17 Cal.3d 42 (1976), which held that the Federal Constitution "immunized" a theater against closure and defined the public nuisance as the "film" and not the "place."

(2) Paradoxically, one court which refused to treat the "place"

as a public nuisance under the Santa Ana ordinance also stated that judicial economy would not justify a trial court's remaining open to try each film as the theater changed the weekly program.

(3) The Appellate Courts in California have denied the City its statutory right under Civil Code, Section 3496, to a reasonable attorney's fee as the prevailing party on the appeal in 454 U.S. 90 on the ground that the City of Santa Ana did not prevail on the merits on the "closure" issue.

(4) The Mitchell Brothers' have filed an application under Civil Code, Section 3496 for an attorney fee of $17,941.95 as having prevailed on the "closure" issue in 454 U.S. 90.

(5) A law and motion trial court in the original lawsuit, Case No. 25-65-30, has held that, under the

Federal Constitution as interpreted in Busch, supra, the place may never be treated as a public nuisance (is immunized) and that the City of Santa Ana is "preempted" from enacting an ordinance which declares it to be such.

(6) That same trial court has denied the City's Motion for Leave to File a Supplemental Pleading under the continuing public nuisance concept, see Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862 (Sept. 23, 1985), in the original lawsuit (No. 26-65-30) after remand in 454 U.S. 90. Said supplemental pleading seeks to incorporate the allegations in the fifth lawsuit set forth at pages 15-18 that the theater has continuously exhibited obscene films for the ten years of its operation since 1975. The Law and Motions Court is about to entertain an application by

the Mitchell Brothers' for an award of an attorney's fee as having prevailed on the denial of plaintiff's Motion to Amend and the defendants' Motion to Dismiss the Complaint in No. 25-65-30.

In its most recent "Petition for Writ of Certiorari" and "Petition for Rehearing" in No. 85-439, the City of Santa Ana is attempting to persuade the membership of this Court to apply Gondeck v. Pan Am World Airways, 382 U.S. 25 at 27 and correct the injustices allegedly created by its denial of the Santa Ana City Attorney's petition on the "closure" issue in No. 81-271 on November 30, 1981. Gondeck holds that the interest in finality of ligitation must yield where the interests of justice would make unfair the strict application of this Court's rules. Here, in the case of a continuing public nuisance which customarily remains within the juris-

diction of the equity court and as to which there is no statute of limitations, the "law of the case" should not bar a reexamination of the "closure" issue in No. 85-439 in 1985 as it applied to the original lawsuit in Case No. 25-65-30, merely because this court, under its discretionary powers, refused to examine that issue in 1981 in Case No. 81-271, where to do so will continue and will perpetuate further and new injustices which have arisen as a result of this court's failure to rule on the "closure" issue on November 30, 1981. In California, see Clemente v. State of California, 40 Cal.3d 202, 219 Cal.Rptr. 445 at 450, holding that:

> "However, the doctrine of law of the case which has been recognized as being harsh is merely a rule of procedure and does not go to the power of the court. It will not be adhered to where its application will result in an unjust decision."

SUMMARY OF ARGUMENT

1. In U.S. v. O'Brien, this Court established a test for the enactment of legislation regarding conduct which involves opposing claims of "speech" and "non-speech" motivation. The Court of Appeals erred. The test has no application to moral public nuisance legislation.

2. The opinion of the Appellate Division, holding O'Brien irrelevant, correctly analyzes the law on "closure" as a remedy in civil public nuisance abatement litigation. The New York Statute includes illegal activity in the form of "lewd conduct", which need not be the sole or dominant use of the premises, and requires proof of a consistent pattern sufficient to prove that the premises are being employed for the illicit use. The single question is, "does the public nuisance exist?"

3. "Lewd conduct" and "trading in

obscenity" are "per se" moral public nuisances. The power to abate "per se" nuisances is an inherent Common Law power of government, needs no enabling legislation, and may not be qualified if the public nuisance is found to exist. The suppression of "per se" public nuisances is among the most important duties of government. It is a Common Law principle that government cannot sanction a nuisance. The Courts are the custodians of the public morals.

This Court authorized the "closure" of a moral public nuisance in Mugler v. Kansas. Mugler can be applied to "lewd conduct" and "trading in obscenity". Avenue Books Store v. City of Talmage, Ohio; Art Theater Guild, Inc. v. Ewing; Huffman v. Pursue Ltd. Vance v. Universal Amusement Co., Inc., has repeatedly been miscited.

This Court should adopt the ratio-

nale expressed by Justice Burke of the New York Court of Appeals in Trans-Lux Dist. Corp. v. Bd. of Regents.

4. "Prior Restraint" is not available as a defense to "closure" which is imposed as an "in rem" remedy (rather than "in personam" against the person) in reforming the property for past unlawful conduct which has been determined to be a moral public nuisance. People ex rel. Hicks v. "Sarong Gals"; People ex rel. Sorensen v. Randolph; State ex rel. Kidwell v. U.S. Marketing, Inc..

Further, an equity court can enjoin specific sexual acts performed in the context of commercial obscenity, independent of the obscenity statute. Ohio ex rel. Keating v. "Vixen".

This case should be remanded under Metromedia, Inc. for further construction by the Court of Appeals.

ARGUMENT

I

THE NEW YORK COURT OF APPEALS' HOLDINGS: (1) THAT THIS COURT'S TEST IN UNITED STATES V. O'BRIEN 391 U.S. 367 (1968) IS APPLICABLE, AND (2) THAT, UNDER THE O'BRIEN TEST, CLOSURE OF THE PREMISES IS AN UNCONSTITUTIONAL PRIOR RESTRAINT ON THE DEFENDANTS' FIRST AMENDMENT RIGHTS, ARE CLEAR ERROR.

The New York Court of Appeals' equivocal opinion on the issue of "closure" is clearly erroneous. It is "equivocal" in the sense that, while holding that this court's test in United States v. O'Brien, 391 U.S. 367 (1968) is applicable, and that under that test closure is an unconstitutional restraint on the defendants' First Amendment rights, see Petition for Writ of Certiorari at pages A-18 and A-19, it also seems to suggest that given additional factual allegations, closure would be authorized under the

analysis expressed in Commonwealth v. Croatan Books, Inc. Virginia , 323 S.E.2d 86.

Amicus Curiae submits that the Court of Appeals' analysis is clear error and that the O'Brien test has no application to the trial facts herein which simply involve a civil complaint to abate certain real estate as a public nuisance under the New York public health law.

The Court of Appeals' opinion has misinterpreted and misapplied the mandatory closure provisions of New York State Public Health Law, Article 23, Title 2, Section 2329, which reads in its relevant parts as follows:

> "Section 2329. Houses of Prostitution; Injunction; Order of Abatement; Sale and Removal of Property; Fees
>
> 1. If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceed-

> ing in any court, an order of abatement shall be entered as a part of the judgment in the case, which order. . . shall direct the effectual closing of the building, erection or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released as hereinafter provided."

The legislative intent in drafting the prototype Red Light Abatement section from which Section 2329 was derived is common knowledge. See 20 Columbia Law Review at 604 which traces the history of such legislation:

> "RED LIGHT" INJUNCTION AND ABATEMENT ACTS--The strong arm of equity has lately found increasing employment through the enactment in thirty-eight states of 'Red Light' Laws for the abatement of disorderly houses. Modelled upon the liquor laws which originated in Iowa, these laws owe their enactment to the inadequacy of criminal prosecutions; and accordingly permit any citizen of the county wherein the nuisance exists to bring his civil action to enjoin and abate it. The effectiveness of the legislation lies in stringent provisions for abatement and in penalties for contempt.

> "This is clearly police legislation, designed to protect the public health and morals rather than to provide a remedy for injury to private property..."

This section of the so-called Red Light Abatement Statute was enacted to withdraw the "discretion" of the equity court once the trial court had found as a matter of fact that the moral public nuisance did exist. The meaning and application of the statute is clear. First, the equity court must perform its judicial fact finding function and determine whether a moral public nuisance exists; then if it so finds, the statute mandates that "closure" must be ordered to abate the public nuisance.

The intent of the State Legislature in enacting the mandatory provisions of Section 2329 had nothing to do with the "free speech" controversy which was presented in O'Brien and the test

which was expressed by this court in that decision. O'Brien's argument was that the "purpose" of Congress in enacting the federal legislation which "prohibited the knowing destruction of the draft card" was "to suppress freedom of speech" and that his burning of the draft card was "free speech." It was in the context of the enactment of legislation regulating conduct and involving opposing claims of "speech" and "non-speech" motivations that this Court framed the O'Brien test for determining the constitutionality of such legislation.

In view of the clear legislative intent in enacting Section 2329 of the New York Public Health Law, the fact that the premises houses a book store, i.e. Cloud Books Inc., is simply irrelevant and the O'Brien test is inapposite. The "closure" issue which Section 2329

presents on its face involves the power of an equity court to grant equitable relief in the form of closure of the premises upon proof of the existence of continuous illegal conduct which constitutes a moral public nuisance. In the application of that statute, only one question is before the trial court, sitting in equity, and that is whether the trial facts establish that a moral public nuisance exists. The complaint to abate a public nuisance does not implicate the O'Brien factors. The remark of the Erie County Supreme Court on this issue are particularly apposite, see "Petition for Writ of Certiorari" at page A-48 reading:

> "An establishment, whether it be of the highest calling or a market for the dissemination of materials of questionable moral value or legality, cannot employ the constitutional rights and protections, which it properly enjoys, as a curtain behind which illegal activity can be freely

> encouraged and conducted and beyond which legitimate law enforcement can perform its proper function in the enforcement of statutes entrusted to such agencies. The protections afforded by the laws and Constitutions of the United States and the State of New York are designed to enhance the full exercise of the freedoms we enjoy and are not to be subverted as shields for illegal conduct."

II

JUSTICE MOULE'S OPINION, SPEAKING FOR THE APPELLATE DIVISION, FOURTH DEPARTMENT, BELOW, CONTAINS A CORRECT ANALYSIS OF THE AVAILABILITY OF "CLOSURE" AS AN EQUITABLE REMEDY IN A CIVIL COMPLAINT TO ABATE A PLACE WHICH HAS BEEN ALLEGED TO BE A MORAL PUBLIC NUISANCE BECAUSE OF A CONSISTENT PATTERN OF ILLEGAL ACTIVITY IN THE FORM OF "LEWD CONDUCT".

Amicus Curiae submits that the opinion of Justice Moule, writing for the Appellate Division, Fourth Department, in the cause below, correctly states the law on "closure" as a remedy in a civil complaint to abate a premises which has been

declared to be a moral public nuisance, see "Petition for Writ of Certiorari" at pages A-23 through A-35.

In his opinion, Justice Moule first considered the question raised by the defendants as to the scope of Title II of the New York Public Health Law and held, as had the Erie County Supreme Court, and as did the New York Court of Appeals thereafter, that the statute was to be broadly construed and could include illicit lewd activity which plaintiffs can prove occurred at the store, see "Petition for Writ of Certiorari" at page A-29. In addressing the burden of proof on the issue of a proscribed use which amounted to a public nuisance, the court held:

> "The question of whether any given premises, including defendant's book store, is subject to Title II of Article 23 of the Public Health Law is necessarily a question of fact. Resolution of this question will depend upon the degree of illicit activity

which plaintiff can prove occurred at the store. In addressing the people's burden of proof under the Washington statute, the court in State ex rel. Carroll v. Gatter, 43 Washington 2d 153, 160, supra, stated: 'To sustain the application of the act, it must be shown to the satisfaction of the court, by a proponderance of the evidence, that the premises were being used as a house of lewdness, assignation, or prostitution as that term is generally understood. The 'use' of the premises of which the statute speaks, requires more than a showing that sporadic acts of prostitution occurred therein.' We believe that this is an appropriate standard of proof for the people to be held to under the Public Health Law. While it will not be necessary for the people to demonstrate that the sole, or even dominant, use of the premises is devoted to the illegality prohibited in the statute, the people will have to show a consistent pattern of conduct sufficient to prove that the premises are being employed for a proscribed use." (Our emphasis)

In addressing the defendants' second contention that the mandatory closure provision impermissibly infringed upon defendants' First Amendment freedoms, Justice Moule's analysis is completely at odds with the opinion of the New York

Court of Appeals. Whereas, the New York Court of Appeals relied upon this Court's test in United States v. O'Brien and the analysis of the California Court of Appeal in People ex rel. Van de Kamp v. American Art Enterprises, 75 Cal.App. 3d 523, Judge Moule held the O'Brien test to be inapplicable and the opinion in People ex rel. Van de Kamp v. American Art Enterprises to be based upon an erroneous reading of O'Brien.

The opposing views of these two New York courts describes an ongoing philosophical controversy which exists in other jurisdictions and needs to be settled. See for example, the lengthy and vociferous dissenting opinion of Associate Justice Thaxton Hanson to the majority opinion (Thompson and Lillie) in People ex rel. Van de Kamp v. American Art Enterprises, supra, at pages 532-572. Amicus Curiae contends

that, in general, Justice Moule's opinion cannot be improved upon, and correctly states the law in this regard, see "Petition for Writ of Certiorari at page A-35:

> "In O'Brien, supra, defendant was arrested and convicted for burning his selective service registration certificate. On appeal, defendant argued that his action in burning his registration certificate constituted symbolic speech and that the Federal statutory provision in prohibiting this activity impermissibly interfered with his First Amendment right of free speech. Thus, the test formulated by the court in O'Brien is applicable only where the Government seeks to regulate the non-expressive element of conduct in a course of conduct which consists of 'speech' and 'non-speech' elements. Since the conduct at issue in American Art Enterprises, supra, arranging prostitution, did not involve any element of speech, reliance on O'Brien was misplaced. Likewise, the conduct sought to be enjoined by the People in the instant case does not contain any element of speech and, hence, O'Brien is inapplicable."

III

THE POWER TO ABATE MORAL PUBLIC NUISANCES, BASED UPON A CONSISTENT PATTERN OF ILLEGAL ACTIVITY IN THE FORM OF EITHER "LEWD CONDUCT" OR "TRADING IN OBSCENITY", IS AN INHERENT POWER IN GOVERNMENT WHICH MAY NOT BE QUALIFIED, IF THE PUBLIC NUISANCE IS FOUND TO EXIST.

Amicus Curiae submits that the confusion which has caused several courts to error and to subject public nuisance abatement legislation involving "closure" to the O'Brien test is the common failure of most courts generally to properly analyze and give recognition to the basic principle that the power to abate moral public nuisances itself is an inherent power in government which may not be qualified if the moral public nuisance is determined to exist. If the courts of this nation are to be equipped to cope with this growing national problem of moral public nuisances, this Court's opinion must direct the attention of the judiciary

to this fundamental principle. In this regard, more than a century ago, this Court pointed out in James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . It is a principle of the common law, that the king cannot sanction a nuisance."

Even more anciently, our Anglo-Saxon legal system has described its own function as: "the Courts are the guardians of the public morals" Rex v. Curl, 2 Strange 789 (1727): Sir Charles Sedley's case 1 SID 168.

A. UNDER THE COMMON LAW AND THE STATUTORY LAW ON "NUISANCES" IN MOST STATES, THE TERM "PUBLIC NUISANCE" EMBRACES BOTH THE "MORAL" PUBLIC NUISANCE, SUCH AS TRADING IN "LEWD CONDUCT" AND/OR "OBSCENITY" WHICH IS OFFENSIVE TO THE MORAL SENSE, AND THE "PHYSICAL" PUBLIC NUISANCE WHICH IS OFFENSIVE TO ONE OF THE 5 PHYSICAL SENSES.

From the earliest days of Anglo-Saxon law, a "moral" nuisance has been abatable as a public nuisance. At common law, both lewd conduct and trading in obscenity was regarded as a "moral" public nuisance. See H.G. Wood, the Law of Nuisances, section 57, at page 77 and section 65 at page 85:

> "57. Indecent exposure of one's person in public place, a public nuisance - As has previously been stated, anything that is offensive to the morals of society, or that is indecent, is a public nuisance. Therefore, any indecent exposure of one's person in a public place, in the presence of several persons, is a public nuisance, and indictable and punishable as such at common law. It is a nuisance because it shocks the moral sensibilities, outrages decency, and is offensive to those feelings of chastity that people of ordinary respectability entertain. . . ."

> "65. Selling obscene picture books, etc. Common nuisance - So, too, all obscene pictures, prints, books or devices are common nuisances, and any person having them in his or her possession for the purpose of exhibition or sale may be indicted therefore at common law,

because they are clearly in derogation of public morals and common decency. Commonwealth v. Holmes, 17 Mass. 336; Commonwealth v. Sharpless 2 S and R (Penn.) 91; 7 Am. Dec. 632."

This common law rule as to moral public nuisances has been codified in most states through adoption of the Field Code in 1872. See, for example, California Civil Code sections 3479 and 3480.

B. A "MORAL" NUISANCE IS A "PER SE" PUBLIC NUISANCE. "LEWD CONDUCT" AND THE "COMMERCIAL DISTRIBUTION OR EXHIBITION OF OBSCENE MATTER" IS A PER SE PUBLIC NUISANCE (AS A MATTER OF LAW)-- NO FURTHER PROOF BEYOND THE FACT OF "LEWD CONDUCT" OR "OBSCENITY" IS REQUIRED. THE POWER TO ABATE THE SAME IS INHERENT IN GOVERNMENT, WHICH IS UNDER AN OBLIGATION TO REMOVE THE "MORAL" NUISANCE.

A "per se" public nuisance is described in 47 Cal.Jur.3d at 214, as follows:

> "Certain activities or conditions are considered nuisances under all circumstances, and are therefore termed nuisances 'per se' as distinguished from so - called nuisances 'in fact.' Nuisances per se are so termed because no proof is required, beyond the actual fact of their existence, to establish that they are nuisances. No proof of ill effects is necessary. . ."

See also Harris v. U.S., 315 A.2d 569 at 572 footnote 9 (February 11, 1974), wherein an en banc District of Columbia Court of Appeals, in facing a similar questio. reversed the trial court judgment and defined a "nuisance per se" as a structure or activity which is a nuisance at all times and under any circumstances. Proof of the act or the existence of the structure establishes the nuisance as a matter of law.

In addressing himself to the public morals issue and the preeminent power of local government to control the same, Woods describes the danger to the environment as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H. G. Wood, Sections 23 and

24, at pages 45-46:

> "Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency."
> "Section 24. Wrongs malum in se. - The class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promoition of evil manners, and anything that

> produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance."
> (Our emphasis.)

The municipal power to protect the environment is inherent in government itself and is so basic that its grant of authority is said to be "implied," and to flow from the Common Law rather than from "express" provisions in the City's Charter or the General Laws of the State.

See "The Law of Nuisances," Wood, Section 743, at page 972.

> "Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, which is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given,

> the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities or by any persons injured thereby. The common law in such a case comes in aid of the authorities and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." (Our emphasis.)

Joyce, in his treatise "Law of Nuisance," Section 345, notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance; at page 498:

> "The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is

> conclusive unless it transcends the power conferred by the charter or violates the constitution."

C. MUGLER V. KANSAS, 123 U.S. 205, AUTHORIZES "CLOSURE" OF MORAL "PER SE" PUBLIC NUISANCES.

This Court has previously stated that "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . ." See James Phalen v. The Commonwealth of Virginia, supra, and that the jurisdiction of the Equity Court to deal with the same is "salutary." Mugler v. Kansas, 123 U.S. 205 (Dec. 5, 1887). In Mugler, supra, this Court specifically held that Equity Courts do have the power to enter summary interlocutory abatement "closure" orders in proper cases. There, a petition had been filed in the Kansas State Court under the thirteenth section of a statute asking (1) that a

group of buildings, constituting the brewery of the defendants, be adjudged a common nuisance, and the sheriff directed to shut up and abate the same, and (2) that the defendants be enjoined from using the premises. The petition was thereafter removed to the federal court and dismissed on the grounds that the "closure" remedy violated due process. On appeal, the U.S. Supreme Court reversed, holding at page 214:

> "Equally untenable is the proposition that proceedings in equity for the purposes indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property. . . . In case of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction.' 2 Story, eq. Section 921, 922. The ground of this

> jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas, courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."

D. THE CLAIM THAT THE "CLOSURE" WHICH WAS AUTHORIZED IN MUGLER V. KANSAS CANNOT BE APPLIED TO A COMMERCIAL BUSINESS WHICH HAS BEEN TRAFFICKING CONTINUOUSLY IN LEWD CONDUCT OR OBSCENITY IS A "MYTH".

The claim that the "closure" authorized in Mugler v. Kansas cannot be applied to a commercial business which is trafficking in lewd conduct or obscenity has been perpetuated by the general reluctance of this Court to de-

cide any issue in the abstract. This Court's refusal to act on the abstract issue has been full blown into a myth that has no basis in case law. See, for example, the dissent of Associate Justice White on denial of Petition for Writ of Certiorari in Avenue Book Store v. City of Tallmage, Ohio, 459 U.S. 997.

In Art Theater Guild, Inc. v. Ohio ex rel. Ewing, supra, this Court "dismissed for want of a substantial federal question" an appeal from the Ohio Supreme Court's decision in Ohio ex rel. Ewing v. "Without A Stitch," 307 N.E.2d 911. A review of the Ohio Supreme Court decision at pages 917-918, clearly shows that an order closing a theater which exhibited a single obscene motion picture film for a substantial period of time is constitutionally valid, at least where a good faith owner could obtain a release by (a)

appearing in court, (b) filing a bond in the full value of the property, and (c) demonstrating to the Court that he would prevent the nuisance from being reestablished (where the "nuisance" is regarded as being the exhibition of the particular film declared to be obscene).

In Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, this Court again had occasion to refer to the "closure" provision of the Ohio Statute. There, the Court noted at page 497, that the narrowing construction of the Ohio Supreme Court in Ohio ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch," supra, avoided the constitutional difficulty which concerned the federal trial court in the Huffman case, and, that the case did not fit "within the exception for statutes which are flagrantly and patently violative of express consti-

tutional prohibitions.'" See also Huffman v. Pursue Ltd., supra, footnote 23 at 420 U.S. 612, which comments favorably upon the "closure" provision of the Ohio Red Light Abatement Statute, Ohio Rev. Code Section 3767.04 and Section 3767.06.

The conclusion that, under no circumstances, may a "padlock" penalty be issued does not follow from either of the above decisions. Because this Court has said that an activity is "presumptively protected" does not, in logic, require a conclusion that the presumption is conclusive! The fallacy of applying such a rule to businesses which continuously exhibit lewd "conduct" is logically demonstrated in the lengthy and comprehensive opinion of Associate Justice Burke, which Amicus Curiae recommends to the members of this Court as a classical statement in this area of the law,

speaking for the majority of the New York Court of Appeals in Trans-Lux Dist. Corp. v. Bd. of Regents, 248 N.Y.S. 2d 857 (Mar. 26, 1964). See, for example, at page 860:

> "If we can accept the obvious -- that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, with Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 73 S.Ct. 585, 97 L.Ed. 946). 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.' (Douglas, J., dissenting in Roth v. United States, 354 U.S. 476, 514, 77 S.Ct. 1304, 1324, 1 L.Ed.2d 1498)."

IV

"PRIOR RESTRAINT" OF FIRST AMENDMENT RIGHTS - IS NOT AVAILABLE AS A DEFENSE TO "CLOSURE" OF THE PLACE AS A MORAL PUBLIC NUISANCE, WHERE THE SAME CAN BE JUSTIFIED ON THE GROUNDS OF REFORMATION OF THE PROPERTY AND AS A PENALTY FOR PAST UNLAWFUL CONDUCT.

While the Court of Appeals' opinion has interpreted Article 23, Title II, of the Public Health Law, Section 2320, as not authorizing a civil abatement action against the unlawful use of trading in obscenity, the analysis of Justice Moule, speaking for the Appellate Division, Fourth Department below, does not so limit the reach of that statute, nor does it require that result.

Other states have given their red light abatement statute a contrary interpretation. See, for example, General Corporation v. State of Alabama ex rel. Sweeton, 320 So.2d 668 at 674 (Alabama Supreme Court 1975), where the Alabama

Supreme Court interpreted the Alabama Red Light Abatement Statute as applicable to obscene material, being merely declaratory of the common law, in that "acts at common law contrary to public morals were considered as public nuisances and subject to abatement as such."

On remand, the Court of Appeals may wish to reinterpret Public Health Law in the light of this Court's decision herein. See Metromedia Inc. v. City of San Diego, 453 U.S. 490 at 521 (1981) where, on summary judgment motions, this Court remanded the case to the California Supreme Court for further construction under Dombrowski v. Pfister, 380 U.S. 479 (1965). Consideration should therefore be given as to whether "prior restraint" of First Amendment rights may nevertheless be urged as a defense to "closure" of the place as a moral public nusiance, based upon a consistent

pattern of "lewd conduct" in the form of a two-dimensional screen portrayal of the type described in the Santa Ana Complaint (referred to herein at pg.17) which also qualifies as "trading in obscenity."

As noted above in General Corporation v. State of Alabama ex rel. Sweeton, supra, at 674, and at page 41 herein, under the Common Law, both "lewd conduct" and "trading in obscenity" are subject to civil abatement as public nuisances, without the need for an enabling statute. A fortiori, upon the general legal principles expressed in Justice Moule's opinion in the Appellate Division, Fourth Department below, closure would also be available as an equitable remedy to abate a place as a moral public nuisance because of illegal activity of trading in obscenity.

A. WHERE "CLOSURE" IS IMPOSED AS AN "IN REM" REMEDY, FOR THE PURPOSE OF REFORMING THE REAL PROPERTY, RATHER THAN AS AN "IN PERSONAM" REMEDY AGAINST THE PERSON, NO FIRST AMENDMENT PROBLEM IS PRESENTED.

Amicus Curiae submits that New York Public Health Law, Article 23, Title II, is simply a codification of the Common Law rule that a court may assume in rem jurisdiction over real estate (the res) which is a health menace and "reform" the property so as to eradicate the health public nuisance. See General Corporation v. State of Alabama ex rel. Sweeton, 320 So.2d 668 at 674 (1975). Sections 2320 through 2332 of the New York Public Health Law (Red Light Abatement Statute), described in the "Petition for Writ of Certiorari" at page A-5, provide a formula for carrying out the process of reformation.

The proper construction of the "padlock" remedy---and one which avoids the "red herring" which is regularly

employed by those dealing in hard-core materials, is the rationale expressed by the Court of Appeal, Fourth District, in People ex rel. Hicks v. "Sarong Gals," 42 Cal.App.3d 556, 117 Cal. Rptr. 24 (Oct. 18, 1974), hearing denied by the California Supreme Court on December 11, 1974, involving "entertainment,"and by the Court of Appeal, First District, in People ex rel. Sorenson v. Randolph, 99 Cal.App.3d 183, 160 Cal. Rptr. 69 (Nov. 30, 1979). Those cases analyze the proceeding as an "in rem" action to reform the real property. For a "modern" adaptation of the same statute, see State ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, Probable Jurisdiction Noted, 454 U.S. 1140, Appeal Dismissed on Motion of Appellant, 455 U.S. 1009, in which the Idaho Supreme Court upheld the closure, stating that it was not a prior restraint, but was

instead merely an in rem punishment imposed on the property, analogous to a civil forfeiture of property used in a crime.

In People of the State of California ex rel. Hicks v. "Sarong Gals," supra, the Court was construing an application of the California Red Light Abatement Statute. There, the trial court permanently enjoined certain parties from maintaining, using or occupying the premises known as "Sarong Gals" for the purpose of "lewdness" and had closed the premises to all use for one year. In affirming the permanent injunction, the Court of Appeal, Fourth District, analyzed the "padlock" provision as an "in rem" rather than an "in personam" remedy, and the principal objective as the reformation of the property itself.

In People of the State of California ex rel. Sorenson v. Randolph, supra, the

Court of Appeal, First District, Division 1 also was construing an application of the California Red Light Abatement Statute. There, the district attorney's office had amassed considerable evidence that the premises were being used for allegedly immoral purposes; that for example, cocktail waitresses regularly solicited acts of prostitution; that customers were (illegally) "cadged" for drinks; that lewd acts such as masturbation were performed on customers, including police investigators; and, in general, that the ownership promoted a systematic course of illegal sexual acts such as to warrant closure of the premises as a public nuisance.

On appeal from the trial court's order of closure, the owners of "Easy Street" argued that the order of abatement unconstitutionally infringed upon its First Amendment rights as a "prior

restraint" of their protected activities of showing pornographic films and nude dancing. In affirming the order of closure at page 71, the Court of Appeal applied the same rationale as was used by the Court of Appeal in the "Sarong Gals" case noted above.

B. AN EQUITY COURT HAS INHERENT POWER TO ENJOIN THE EXHIBITION OF SPECIFIC SEXUAL ACTS PERFORMED IN THE CONTEXT OF COMMERCIAL EXPLOITATION OF OBSCENITY, AS UNLAWFUL AND CONTRARY TO PUBLIC POLICY, AND INDEPENDENT OF THE OBSCENITY STATUTES.

Further, one cannot ignore the fact that an equity court has inherent power to enjoin the exhibition of specific sexual acts which are performed in the context of commercial exploitation of obscenity, independent of any need to consider the obscenity statutes. That factor must also be considered in resolving the problem of how the property is to be reformed. See Ohio ex

rel. Keating v. Motion Picture Film Entitled "Vixen," 27 Ohio St.2d 78, 272 N.E.2d 137 at 141 (July 31, 1971), adhered to upon remand in 35 Ohio St.2d 215, 301 N.E. 2d 215, 301 N.E.2d 880 (Sept. 26, 1973).

> "Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof 'for commercial exploitation rather than for a genuine scientific, educational, sociological, moral, or artistic purpose' is forbidden by Ohio law. Here, there is no dispute as to the fact that 'Vixen' does depict numerous acts of purported sexual intercourse, and obviously it does so for a commercial purpose....
>
> "Therefore, where scenes in a motion picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those scenes are violative of R.C. Section 2905.34 and 2905.35, constitute a 'nuisance' within the meaning of R.C. Section 3767.01, and their exhibition may be enjoined as provided in R.C. Section 3767.02 et seq."

CONCLUSION

New York State Public Health Law, Article 23, Title II, should be remanded to the New York Court of Appeals for further consideration under the principles expressed above. Metromedia Inc. v. City of San Diego, 453 U.S. 490 at 521 (1981).

12/27/1985. Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this 27th day of December, 1985, the original and 40 copies of the within Amicus Curiae Brief of the City of Santa Ana, California, were deposited in the United States Post Office in Sun Valley, Calif. with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage pre-paid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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AMICUS CURIAE

BRIEF

(4)

85-437

No. 85-[redacted] 437

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE PEOPLE OF THE STATE OF NEW YORK ex rel. RICHARD J. ARCARA, DISTRICT ATTORNEY OF ERIE COUNTY,

Petitioner,

vs.

CLOUD BOOKS, INC. d/b/a/ VILLAGE BOOK AND NEWS STORE, CHARLES A. OTTAVIANO, BLANCHE DUDLEY and all other persons unknown claiming any ownership, right, title or interest in the property affected by this action,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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January 3, 1986

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INTEREST OF THE AMICUS CURIAE

One of the fundamental responsibilities and concerns of the municipal government of the City of New York is to protect the quality of its urban life for its citizenry. In fulfilling this basic

governmental function, the City, like petitioner herein, is authorized under state law, Article 23, Title II, of the Public Health Law, entitled "Houses of Prostitution; Injunction and Abatement", to bring an action to enjoin and abate a pubic nuisance which is defined as any premises used "for the purpose of lewdness, assignation or prostitution." (Public Health Law §2320).* The decision of the Court of Appeals if upheld in the instant case would eviscerate the effectiveness of the statute whose

*Pursuant to local law, title C of Chapter 16 of the Administrative Code of the City of New York entitled "Nuisance Abatement Law", the City is also authorized to seek the closure of premises which are used for prostitution and for the maintenance of other public nuisance activity which includes illegal conduct relating to drugs, gambling, and stolen property. Section §C16-2.0 therein entitled "Legislative declaration" states that the City Council has found that ".... public nuisances exist in the City of New York ... which interfere with the interest of the public in the quality of life and total community environment, the tone of commerce in the City, property values and the public safety, and welfare; the council further finds that the continued occurrence of such activities and violations is detrimental to the health, safety and welfare of the people of the City of New York and of the businesses thereof and visitors thereto..."

laudatory purpose is beyond dispute.

The holding of the New York Court of Appeals that the mandatory closure of premises for one year set forth in Section 2329 of the Public Health Law is unconstitutional when applied to a successful prosecution against a business also engaged in protected First Amendment activity, unless the prosecuting body satisfies the additional burden of demonstrating that less restrictive relief available under statute* would be insufficient to abate the nuisance, would unjustifiably expand constitutional protection to businesses which allow or promote prostitution and other illegal sexual activity on its premises and seriously damage local government's ability to effectively combat and eliminate such

*The Court of Appeals relies on Section 2320, subdivision 2, of the Public Health law which declares that the nuisance "shall be enjoined and abated as hereafter provided." (emphasis added). However, Section 2329 which follows, states that when a nuisance has been established "an order of abatement shall be entered... and shall direct the effectual closing of the building, erection or place against its use for a period of one year..."

public nuisances.*

*Enforcement efforts against public nuisances which promote or maintain prostitution are emasculated by the Court of Appeals' decision in two distinct ways. First, it is evident that the Court of Appeals intends to place a heavy burden of proof on prosecuting bodies in establishing that less restrictive relief, i.e. injunction, would not be sufficient in abating the nuisance on premises where First Amendment activity is also present since the Court's decision in refusing to sustain the order of abatement implicitly rejects as significant the fact that the illegal conduct was ongoing and that the threat of criminal prosecution itself was not an effective deterrent. Secondly, the decision is a broad invitation for purveyors of prostitution to clothe their conduct with the accoutrements of First Amendment activity and thereby thwart valid enforcement efforts. Promoters of prostitution in the past have been particularly resourceful in seeking to disguise their activity behind business "fronts" such as massage and rap parlors, nude photo and body painting studios, and escort services.

The deleterious effects which we subscribe to the Court of Appeals' decision are not exaggerated or farfetched. See, for example, People ex. rel. Van De Kamp v. American Art Enters., 75 Cal App 3d 523, 142 Ca. Rptr. 519 (Ct. of App., 2d Dist., 1977), a case cited with approval by the Court of Appeals (where the Court held that despite the finding that the premises was a "nerve center" which orchestrated a vast prostitution operation the statutory abatement order should be vacated since the premises also housed First Amendment activity, a publishing and distributing operation of pornographic materials).

This brief is submitted pursuant to Rule 36.4 of the rules of this Court in support of petitioner's request for reversal.

ARGUMENT

ARTICLE 23 TITLE II OF THE NEW YORK PUBLIC HEALTH LAW WHICH DIRECTS THE MANDATORY CLOSURE FOR ONE YEAR AS A PUBLIC NUISANCE OF PREMISES WHERE PROSTITUTION AND OTHER ILLEGAL SEXUAL CONDUCT OCCUR DOES NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN APPLIED TO PREMISES WHERE FIRST AMENDMENT ACTIVITY IS ALSO PRESENT.

In the instant case, the New York Court of Appeals held that the one year mandatory closure provision of Article 23, Title II, of the New York Public Health Law, was an impermissible restriction on respondent bookstore's First Amendment rights unless the prosecuting body meet the burden of establishing that "less restrictive" relief, injunctive relief, would be insufficient to abate the public nuisance present there.

In so holding, the Court sought to apply United States v. O'Brien, 391 US 367 (1968) and the four pronged standard articulated therein. The O'Brien standard is not applicable here. Nonetheless, even under the O'Brien standard, the mandatory closure provision of the Public Health Law is not unconstitutional when applied to public nuisances where First Amendment activity is also present.

In O'Brien, defendant was arrested and convicted for burning his selective service registration certificate. Defendant asserted that his destruction of the registration certificate constituted symbolic speech and that the Federal statute prohibiting this activity impermissibly interfered with his First Amendment right of speech. The standard or test formulated by this Court in O'Brien was directed to where the Government seeks to regulate the nonexpressive element of conduct in a course of conduct which consists of both "speech" and "nonspeech" elements. See, i.e., Clark v. Community For Creative Non-Violence, ___ US ___, 104 S. Ct. 3065 (1984) (where

this Court applied the O'Brien test to determine whether a National Park Service regulation prohibiting camping in certain parks violates First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park in connection with a demonstration intended to call attention to plight of homeless). This Court said (391 US 367, 376-377):

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater

than is essential to the furtherance of that interest."

In applying the O'Brien standard, the Court of Appeals ignored the fundamental and essential fact that the unlawful conduct complained of and sought to be regulated, prostitution and other illegal sexual activity, possesses no cognizable element of speech nor is one alleged, and is entirely unrelated to the operation of an adult bookstore.

The mere fact that illegal conduct occurs on the premises of a bookstore does not make every attempt to enforce the law on those premises subject to constitutional scrutiny and protection. One who entwines clearly illegal activity with the exercise of First Amendment rights is not entitled to a constitutional shield preventing government from prohibiting the illegal activity.

Such a view was endorsed by this Court in Paris Adult Theatre I v. Slaton, 413 US 49, 67 (1973), where the Court stated:

"Conduct or depictions of conduct that the state police power can

> prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

The Court of Appeals application of the principles in O'Brien simply because the mandatory closure provision has an incidental impact on the bookstore's First Amendment rights is flawed. Incidental impact of governmental action on First Amendment rights alone, no matter how substantial, does not warrant constitutional protection.* For

*See Members of City Council v. Taxpayers for Vincent, ___ US ___, 104 S. Ct. 2118, 2128 (1984) which cited with approval the following language of Metromedia, Inc. v. San Diego, 453 US 490, 561 (1981) (BURGER, C. J., dissenting):

> "But to say the ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation." (emphasis in original)

instance, incarceration of an individual, such as an owner of a bookstore, for violation of the criminal law may have a greater adverse impact on his ability to exercise his First Amendment rights than the statutory provision at issue here. Yet, nevertheless, it could not seriously be asserted that the curtailment of his constitutional rights would warrant immunity from penal sanctions. In the same vein, a successful in rem tax foreclosure proceeding against a bookstore would not be subject to constitutional protection notwithstanding that such proceeding would completely eliminate the bookstore owner's exercise of First Amendment rights at the subject premises.

The circumstances of the instant case clearly fall within the purview of the above cited examples. It is readily apparent that the Court of Appeals wrongly applied the O'Brien test herein because it failed to recognize that the illegal conduct that sought to be regulated, prostitution and other illegal sexual activity, does not possess any protected First Amendment speech element and that the statutory

provision was solely intended to eliminate such criminal conduct by closing down any premises where such conduct is prevalent.

Even, assuming, arguendo, that the Court of Appeals was correct in concluding that the O'Brien test was applicable to the instant case, it erroneously held that petitioner failed to meet the fourth prong of the test, namely, that the mandatory closure provision is a restriction on First Amendment freedoms which is no greater than is essential to the furtherance of the substantial government interest present.*

*The Court properly found that the statute satisfied the first three prongs of the O'Brien test. See, infra, p. 7, where the test is set forth. Thus, the Court concluded (Arcara v Cloud Books, 65 NY2d 324, 336, 480 NE2d 1089, 1098-99 (1985):

> "A statute aimed at the abatement of a public nuisance is certainly within the police power of the State (see, Lane v. City of Mount Vernon, 38 NY2d 344; Lawton v. Steele, 119 NY 226, aff'd 152 US 133). We also have no difficulty

(footnote cont'd on next page)

In so holding, the Court of Appeals has engaged in the type of intrusion into governmental decisionmaking which this Court has refrained from when it has applied the fourth prong of the O'Brien test, choosing instead to give appropriate deference to the wisdom and judgment of responsible

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*(footnote cont'd from previous page)

> concluding that restriction of the conduct alleged in the complaint furthers an important governmental interest. Prostitution is criminal activity no matter where it occurs (Penal Law $230.00), and the other sexual activity alleged is prohibited in public places (see, Penal Law § 245.00; cf. People v. Adult World Bookstore, 168 Cal App 3d, at p. 416, 166 Cal Rptr, at p. 523, supra ["Not everyone who enters a dirty bookstore • • • expects to be molested, propositioned, or subjected to an open view of live homosexual acts of others."]). Additionally, the interest in restricting this conduct is clearly unrelated to the suppression of free expression. Thus we find, as did the courts in Van De Kamp and Croatan Books, that the first three elements of the O'Brien test are satisfied."

government decisionmakers where their determinations are reasonable. See United States v. Albertini, ___ US ___, 105 S. Ct. 2897 (1985); Clark v. Community for Creative Non-Violence, ___ US ___, 104 S. Ct. 3065 (1984).

Thus, in Community for Creative Non-Violence, this Court upheld the constitutionality of a National Park Service Regulation which prohibited camping in certain parks where there was a claimed First Amendment violation by those who wished to engage in a demonstration violative of said regulation. This Court, in rejecting the lower court's view that less restrictive alternatives could satisfy the government interest in preserving park lands, opined (104 S. Ct. 3065):

> "We do not believe, however, that either United States v. O'Brien or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." (Footnote citation omitted).

Again, in United States v. Albertini, ___ US ___, 105 S. Ct. 2897, 2907 (1985), this Court demonstrated that the courts should not substitute their own judgment for that of the decisionmaker in determining how much restriction is wise.

> Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." (Citations omitted) (emphasis added)

In the case at bar, the Court of Appeals stated that since petitioner had failed to demonstrate that less restrictive relief, an injunction, would be insufficient to abate the nuisance that closure would be unconstitutional.

> "[W]e conclude that closure of defendant's bookstore is not essential to the furtherance of the purposes underlying title II [Public Health Law], and is thus an unconstitutional restraint on defendant's First Amendment rights. While closure might be the most efficient remedy "considerations of this sort do not empower a (State) to abridge freedom of speech (Schneider v. State, 308 US 147, 164)."
>
> Cloud Books, supra, 65 NY2d at 337, 480 NE2d at 1099.

In effect, the Court of Appeals has substituted its judgment for that of the State Legislature and has found that less restrictive relief may successfully eliminate the nuisance activity here.

In light of Community of Creative Non-Violence and Albertini, and the Court of Appeals' own concession that "closure might be the most efficient remedy" (65 NY2d at 337, 480 NE2d at 1099), it is clearly evident that the mandatory closure provision satisfies the fourth prong of the O'Brien test notwithstanding the Court of Appeals' view that other less restrictive means such as an injunction could have been utilized to promote the

substantial governmental interest involved herein. The Legislature's determination to close for a limited period of time premises where prostitution and other illegal sexual activity have occurred in order to eliminate such activity is certainly a reasonable one directed "precisely to the substantive problem which legitimately concerns the City." Members of City Council v. Taxpayers for Vincent, ___ US ___, 104 S. Ct. 2118, 2132 (1984).*

*As is evidenced by the enactment in New York and numerous other states in the early part of this century of nuisance statutes directed to premises where prostitution has occurred (see Cloud Books, supra, 65 NY2d at 329, 480 NE2d at 1093), the penal law had not been considered effective in eliminating such illegal activity. This view of the penal law continues today. See, for example, O'Connor, The Nuisance Abatement Law as a Solution to New York City's Problem of Illegal Sex Related Businesses in the Mid-Town Area, 46 Ford. L. Rev. 57, 61-66 (1977). It is significant to note that the Court of Appeals in tracing the history of New York's statute observed that when it was originally passed in 1914 it only provided for injunctive relief and it wasn't until 1927 that the law was changed to include an order of abatement. The Court attributed the change to the fact that "the Legislature, apparently not content with the effectiveness of the 1914 statute, repealed that version". Cloud Books, supra, 65 NY2d at 329, 480 NE2d at 1093. The present version of the law is essentially identical to the statute enacted by the Legislature almost 60 years ago.

The Court of Appeals also erred in subjecting the mandatory closure provision to constitutional scrutiny on a case by case basis, asserting that it is the burden of the prosecuting body to show that less restrictive relief other than that imposed by the statute would not be sufficient to abate the nuisance where its imposition would impact on First Amendment activity. In applying the O'Brien test, this Court has repeatedly rejected a case by case analysis, stating that "the First Amendment does not bar application of a neutral regulation that incidentally burdens speech simply because allowing an exception in a particular case will not threaten important government interests." Albertini, supra, 105 S. Ct. at 2907. See also, Community for Creative Non-Violence, supra, 104 S. Ct. at 3070.

Finally, in holding that the mandatory closure provision was unconstitutional, the Court erroneously relied on the fact that respondent bookstore would be prohibited from engaging in First Amendment activity at that particular location. As this Court stated in Heffron v. Int'. Soc.

for Krishna Consc., 452 U.S. 640, 647 (1981):

> ". . . the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."

Accordingly, it has been held that government restrictions on free use of land which intrude on the exercise of First Amendment rights are permissible when it is in furtherance of a significant governmental interest and alternative means of communication are available. Young v. American Mini Theatres, 427 US 50 (1975); In re G. & A. Books, Inc., 770 F2d 288 (2d Cir., 1985), pet for cert. pend.; cf. Schad v. Mount Ephraim, 452 US 61 (1981).

In American Mini Theatres, this Court held that a zoning regulation which required adult movie theatres to be dispersed throughout the City of Detroit for the purpose of preventing deterioration of neighborhoods was valid although it regulated activity protected under the First Amendment by prohibiting these theatres at certain locations. Both

the plurality and concurring opinions found that the zoning regulation was constitutional since it did not restrict expression because of its message, and there was no significant curtailment of adult movie presentations or the opportunity for a message to reach an audience.

American Mini Theatres demonstrates that the restriction that the mandatory closure provision places on the exercise of First Amendment rights by respondent bookstore was constitutionally valid. The First Amendment restriction imposed here, mandatory closure of the premises for a year, was far less severe than that upheld in American Mini Theatres, where the restriction did not have a limited life. Additionally, the Court of Appeals had properly found that the closure provision was unrelated to the suppression of free speech and in furtherance of an important government interest. And, just like the adult movie theatres in American Mini Theatres, there are a number of other locations besides the nuisance site where respondent bookstore can exercise its First Amendment right in

selling adult books.

Therefore, the conclusion reached by the Court of Appeals that the closure provision impermissibly restricted First Amendment rights is simply wrong, contrary to this Court's holding in American Mini Theatres.

For all the above reasons, we urge this Court to find that the mandatory closure provision of the Public Health Law is constitutional even when applied to premises where First Amendment activity is also present.

CONCLUSION

The order of the New York Court of Appeals should be reversed.

January 3, 1986

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 85-437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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District Attorney of Erie County,

Petitioner,

—v.—

CLOUD BOOKS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT
OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE*, AND BRIEF OF *AMICI CURIAE*

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MOTION OF THE
AMERICAN CIVIL LIBERTIES UNION AND
THE NEW YORK CIVIL LIBERTIES UNION
FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE

The American Civil Liberties Union (ACLU) and the New York Civil Liberties Union (NYCLU) move for leave to file the attached brief as amici curiae.

The ACLU is a nationwide, non-profit, non-partisan organization of over 250,000 members dedicated to defending the principles embodied in the Bill of Rights. The NYCLU is one of its statewide affiliates. Both organizations have frequently appeared as amicus curiae in free speech cases before this Court.

This case raises important issues of longstanding concern to both the ACLU and the NYCLU. Since its inception more than a half century ago, the ACLU has continuously resisted government efforts to limit speech

in pursuit of state interests that could be achieved by less restrictive means. Petitioner's argument in this case directly challenges that basic principle, one of the central postulates of this Court's First Amendment jurisprudence. Moreover, petitioner's attempt to dismantle the constitutional structure erected by this Court in First Amendment cases heavily rests on two First Amendment decisions in which the ACLU served as counsel of record. See United States v. Albertini, ___ U.S. ___, 105 S.Ct. 2987 (1985); Clark v. Community for Creative Non-Violence ("CCNV"), ___ U.S. ___, 104 S.Ct. 3065 (1984).

As detailed within, amici believe that petitioner has misinterpreted the import of those decisions. More importantly, amici continue to believe, as this Court has repeatedly held, that regulations affecting fundamental First Amendment rights must be

crafted with a scalpel rather than a hatchet.

The ACLU and NYCLU respectfully move for leave to file the attached brief as amici curiae in order to present this Court with their views in this important First Amendment case.

Respectfully,

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February 5, 1986

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INTEREST OF AMICI

The interests of amici are set forth in the motion attached to this brief.

STATEMENT OF THE CASE

In amici's view, the resolution of this case turns on three critical observations by the New York Court of Appeals. First, the operation of a bookstore is clearly a protected First Amendment activity. Second, the closure order sought by petitioner in this case would halt, not regulate, all of the bookstore's First Amendment activities for a one year period. Third, the state's legitimate interests can be served by less drastic remedies specifically authorized by the New York State legislature. Thus, in its present posture, this is not a case about controlling prostitution. Rather, it is a case about the

unnecessary use of government power to suppress speech.

Without burdening the Court with a full factual recitation, certain aspects of the record are worthy of emphasis. From the outset of these proceedings, petitioner has forthrightly acknowledged that respondents are operating a bona fide bookstore. See Petitioner's Brief at 5. Despite the implication contained in petitioner's question to the Court, therefore, this case does not present a situation in which a few books or magazines are displayed as a pretext to shield plainly unlawful activity.

Respondents are in business to sell books and magazines. Some of those books and magazines are sexually explicit. However, there has been no allegation by petitioner nor judicial finding below that any of the material in respondents' store is legally obscene or otherwise unprotected by the First

Amendment.

The decision by the New York Court of Appeals, which partially granted respondents' motion for summary judgment, is actually quite limited in scope. It neither condones prostitution nor impedes petitioner's efforts to deal with it. To the contrary, the decision below specifically upholds petitioner's right to seek an injunction against any acts of prostitution on respondents' premises under the public nuisance provisions of Title II of New York State's Public Health Law.

The efficacy of such an injunction, coupled with the threat of contempt if the injunction is violated, cannot be known on the present record for the simple reason that it has not been tried.

SUMMARY OF ARGUMENT

Petitioner presents this case, and the New York Court of Appeals analyzed this case, as an incidental restriction on speech subject to constitutional scrutiny under the standards set forth in United States v. O'Brien, 391 U.S. 367 (1968).[1] Applying O'Brien, the decision below is manifestly correct. Under the fourth prong of the O'Brien test, the state must demonstrate that even incidental restrictions on speech are "no greater than . . . essential" to the furtherance of important governmental interests. Id. at 377. Upon this record, that showing has not and cannot be made.

1. In an alternative holding, the court below also described the proposed closure order as a prior restraint. (A.12-16). Numbers in parentheses preceded by the letter "A." refer to pages in the Appendices to the Petition for Writ of Certiorari.

Although O'Brien is sufficient to dispose of petitioner's claim, amici do not believe that the abridgement of speech involved in this case should, in fact, be judged under the relaxed O'Brien formula. As this Court has recognized, the O'Brien approach closely parallels the time, place and manner analysis that this Court has long employed in First Amendment cases. See Clark v. Community for Creative Non-Violence, ___ U.S. ___, 104 S.Ct. 3065, 3071 (1984). Thus, most of the cases applying O'Brien have involved restrictions only on the "manner" of speech.

The constitutional abridgement involved in this case goes far beyond a mere restriction on the manner of speech; it represents a total prohibition of speech. Whether characterized as a prior restraint or not, such a substantial impairment of First Amendment rights cannot be sustained when the

state has deliberately bypassed less restrictive means fully adequate to satisfy its interest.

Accordingly, amici urge this Court to apply an exacting level of scrutiny to petitioner's request for a closure order. Even assuming that request is "incidental" to petitioner's content-neutral goal of curbing prostitution, it is surely not "incidental" when viewed in terms of its devastating and intended impact on respondents' First Amendment speech.

ARGUMENT

THE STATE'S EFFORT TO CLOSE A BOOKSTORE BECAUSE OF ALLEGED ACTS OF PROSTITUTION ON THE PREMISES CANNOT BE SUSTAINED UNDER THE FIRST AMENDMENT

A. Petitioner's Request For A Closure Order Must Be Subject To Close Judicial Scrutiny

The threshold question in this case, as in every First Amendment case, is what standard to apply in assessing the constitutionality of the state's proposed action. The New York Court of Appeals held that petitioner's request for a court order closing respondents' bookstore could not be supported under the standards announced in United States v. O'Brien, supra. Amici concur in that judgment. However, amici also believe that the facts of this case command even more exacting scrutiny than O'Brien compels.

O'Brien represents an attempt to

balance conflicting interests in those situations where First Amendment rights are incidentally affected by the state's legitimate pursuit of an important governmental interest. In determining whether an impact on speech is "incidental," and thus within the ambit of O'Brien, two inquiries are relevant. First, was the government's action directed at speech? Second, how seriously affected were the free speech rights at stake?

Focusing solely on the first of these inquiries, the New York Court of Appeals found the O'Brien test applicable on the assumption that petitioner was seeking a closure order to suppress prostitution, not to suppress speech. This Court, by contrast, has appreciated that government action cannot properly be deemed "incidental" for constitutional purposes if it substantially impairs the exercise of First Amendment

rights. See Shelton v. Tucker, 364 U.S. 479 (1960).

O'Brien is entirely consistent with this recognition that the standard by which government action is judged is necessarily tied to its impact on speech. Indeed, this Court has often construed O'Brien in precisely those terms, justifying its reduced level of scrutiny by its reduced impact on speech. Recently, for example, this Court noted that the O'Brien test "is little, if any, different from the standard applied to time, place and manner restrictions." Clark v. Community for Creative Non-Violence, 104 S.Ct. at 3071.

Even a quick reference to post-O'Brien cases is sufficient to demonstrate the accuracy of this observation. Each could just as easily be characterized as a restriction on the manner of speech. For example, in CCNV, a federal regulation forbid

protesters from sleeping in Lafayette Park but it did not forbid them from expressing their message of symbolic protest in some other manner. Similarly, in Los Angeles v. Taxpayers for Vincent, ___ U.S. ___, 104 S.Ct. 2118 (1984), a municipal ordinance prohibited the posting of campaign flyers on public utility poles; it did not, and could not, prohibit other forms of electoral campaigning. Indeed, even in O'Brien itself, the issue was whether the defendant could express his opposition to the Vietnam War in one specific manner -- namely, by burning his draft card.

This case obviously raises very different issues. Whatever concerns may be motivating petitioner, the closure order he seeks is not a prohibition on a certain manner of speech. It is intended to bar all speech by respondents for a period of one year through the simple expedient of closing

respondents' bookstore. Under these circumstances, the O'Brien analysis simply does not apply. See Schad v. Mt. Ephraim, 452 U.S. 61, 75-76 (1981).

The New York Court of Appeals correctly observed that the kind of order petitioner is seeking bears a close resemblance to the sort of prior restraints that this Court has consistently condemned. See Southeastern Promotions v. Conrad, 420 U.S. 546 (1975); Bantam Books v. Sullivan, 372 U.S. 58 (1963); Near v. Minnesota, 283 U.S. 697 (1931). By virtue of a judicial decree, respondents would be barred from selling any books prior to a judicial determination that the books respondents wish to sell for the next year are unprotected by the First Amendment.[2] Cf. Freedman v.

2. See generally, Note, Pornography, Padlocks and Prior Restraints: The Constitutional Limits of the Nuisance Power, 58 N.Y.U.L.Rev. 1478 (1983).

Maryland, 380 U.S. 51 (1965).

Whether characterized as a prior restraint or not, this impact on speech surely exceeds the incidental abridgements this Court contemplated in O'Brien. Absent some showing that the government's ends cannot be achieved by less restrictive means, this Court has never sustained such substantial interference with constitutional rights. E.g., Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980). Were the rule otherwise, the doctrine of fundamental rights would have little meaning.

"Because First Amendment freedoms need breathing space to survive," NAACP v. Button, 371 U.S. 415, 433 (1963), government regulations affecting free speech must be narrowly tailored and sensitively enforced. Forgetting that lesson, petitioner seeks the right in this case to engage in

constitutional overkill. His request to proceed without even exploring less restrictive alternatives was properly rejected by the court below.

B. The Closure Order Cannot Be Justified Under O'Brien

Assuming that the closure order sought in this case could somehow be described as merely "incidental" to respondents' free speech concerns, petitioner still fails to satisfy the O'Brien test. Under O'Brien,

> [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The court below found that the state has a substantial interest in regulating prostitution and other unlawful sexual activities in public places. The existence of that interest, however, cannot excuse the state's failure to show, as O'Brien requires, that the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The actions of the New York legislature preclude a finding that a closure order was essential to achieve the state interest. The New York Court of Appeals properly noted that, given the legislature's provision of a full range of injunctive remedies other than closure, it was inappropriate to use the means with the harshest First Amendment impact -- closure -- before the lesser means provided had been

tried and proven ineffective:

> In the present case, there has been no "less restrictive" relief imposed, nor has the district attorney demonstrated that the injunctive relief provided for in Title II would be insufficient to abate the nuisance. If the district attorney succeeds at trial, he will be entitled to a permanent injunction against the existence or maintenance of a nuisance in violation of Section 2320 and the injunction will be binding upon defendant . . . Under the circumstances we conclude that closure of defendant's bookstore is not essential to the furtherance of the purposes underlying Title II, and is thus an unconstitutional restraint on defendant's First Amendment rights.

(A.19).

Amici do not contend -- and the New York Court of Appeals did not rule -- that a bookstore, as such, is immune from reasonable regulation:

> Although the fact that a premises houses a bookstore

> rather than some commercial enterprise does not provide it with immunity from all regulation, bookstores operating as such may not simply be equated with ordinary nuisances or with personal property subject to forfeiture.

(A.16).[3]

Indeed, the Court of Appeals decision recognized that the prosecutor would still have available the remedy of closure against the bookstore should narrower forms of relief prove ineffective. What the New York court found offensive was petitioner's gratuitous effort to abridge First Amendment rights without any showing of necessity in the record. While booksellers have no license to ignore legitimate government

3. Similarly, a bookstore is not immune, for example, from a closure due to violation of fire regulations or tax law. But such regulatory schemes would typically provide the bookstore an opportunity to remedy any deficiencies before the business is closed down.

regulation, even legitimate government regulation may not ride roughshod over First Amendment freedoms.

Petitioner has not shown any basis for his failure to try more narrowly tailored means of controlling the alleged nuisance. That failure effectively dooms petitioner's case. In particular, petitioner's claim that he was unsuccessful at obtaining preliminary injunctive relief in the lower state courts cannot and does not justify his resort to the drastic remedy of closure.

To the extent that petitioner's motion for a preliminary injunction was denied because of a lack of probable success on the merits (A.43), it obviously does not support his present request for a more extreme remedy. To the extent that denial of preliminary relief was premised on an initial view that the applicable statute only applied to actual houses of prostitution (A.43), the

New York Court of Appeals has now ruled otherwise. Accordingly, that impediment to injunctive relief will no longer exist upon any remand to the trial court.

Petitioner's failure to seek less restrictive means of stopping the alleged nuisance is particular egregious in light of the fact that the offensive conduct at issue here was plainly distinct from the legitimate activities of the bookstore. Petitioner made no argument that the sexual activity allegedly uncovered was so intertwined with the other activities of the bookstore that to regulate the unlawful activity would necessarily have required an infringement upon the protected free speech activities of the bookstore. Indeed, petitioner's attempt in this case to evade tne First Amendment hinges on the claim that the sexual and bookselling activities in respondents' store are separate and distinct.

By expressly providing for an injunction limited to the alleged illegal activity, the statutes in New York are well drafted to deal with precisely this situation. Under New York law, a carefully framed injunction could have been issued solely against any illicit sexual activity while leaving the constitutionally protected activities of the bookstore properly untouched. No more was required to fulfill the state's interests.[4] Yet, petitioner made no effort to obtain such relief.

Because the restriction sought by petitioner was not necessary to serve the

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4. The availability of less drastic alternatives in this case distinguishes Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), where the Court upheld zoning measures aimed at limiting future adult movie theatres. In Young there was no alternative remedy that could have effectively limited the density of such theatres in the same way that the injunctive remedy here could control the unlawful sexual activities.

governmental interest alleged, it must be struck down as an unacceptable abridgement of First Amendment rights even under O'Brien.

C. Albertini And CCNV Do Not Mandate A Contrary Result

Petitioner relies heavily on this Court's recent opinions in United States v. Albertini, 105 S.Ct. 2897 (1985), and CCNV, for the proposition that in cases of "incidental" abridgement the government need not take into account the impact of its actions on bona fide First Amendment interests. However, neither case can fairly be read to represent such a dramatic departure from traditional First Amendment law.

Both in Albertini and CCNV, the Court proceeded on the assumption that the alleged First Amendment speech was inseparable from conduct reasonably subject to government

regulation. Thus, the Court concluded, the government's interests in park preservation and secure military bases could not effectively be served without enforcing its regulations, despite their impact on speech.

No such facts are at play here. The free speech in this case is easily separable from the conduct sought to be regulated in ways that the claimed expressive conduct in Albertini and CCNV was not. The offending sexual activity of third parties allegedly occurring on the premises of the bookstore could readily be dealt with, as the Court of Appeals found, without halting respondents' First Amendment activity. Thus, the choice of a narrow remedy in this case would not burden the government's pursuit of its non-speech interests, unlike this Court's

view of the situation in Albertini and CCNV.[5]

In sum, the closure order sought by the district attorney would impose an unnecessary burden on activities concededly protected by the First Amendment. Moreover, the statute on which petitioner relies expressly provides for less drastic remedies that, at least on their face, promise to be fully effective. Those remedies could have been utilized to prohibit the alleged prostitution activity without affecting at all respondents' First Amendment rights.

They were not pursued only because petitioner chose to ignore them.

On that ground alone, CCNV and Albertini are readily distinguishable, and the O'Brien test has not been met.

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5. Also, neither CCNV nor Albertini provided the clear statutory alternative to the challenged relief that the New York legislature expressly provided here. Thus, Albertini's cautionary reference to judicial efforts to "hypothesize" some "imaginable" or "conceivable" less drastic means does not apply. The New York statute itself provides lesser alternatives that promise to fully accomplish the state's goal. The failure of the prosecutor to even attempt those lesser alternatives cannot, therefore, be justified.

CONCLUSION

For all of the foregoing reasons, the decision of the New York Court of Appeals should be affirmed.

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